

SINGAPORE REPORTS.**THE SULTAN OF JOHORE v. TUNGKU ABUBAKAR & ORS.**

[App. Civ. Juris. (Murray-Aynsley, C.J., Singapore, Willan, C.J., Federation of Malaya and Evans, J.) November 1, 1949]

[Singapore — Civil Appeal No. 7 of 1949]

International Law — Jurisdiction — Sovereignty of Sultan of Johore — Waiver of privileges — Suit concerning land within jurisdiction of the Court — Constitutional Law.

This was an appeal and cross-appeal from the decision of Gordon-Smith, J. reported in (1949) M.L.J. 187. During the Japanese occupation of Malaya, the Sultan of Johore had successfully applied to the Japanese High Court in Singapore to have set aside, under Muslim Law, two gifts of land he had made to his granddaughter (daughter of his second son, Tungku Abubakar) who had died shortly before the outbreak of war. The Sultan obtained a decree by which the land reverted to him. After the liberation the trustees of the deed of gift, Tungku Abubakar, Mr. H. W. Cowling and Dr. G. H. Garlick, began proceedings by Originating Summons to have the Japanese Decree set aside. The Sultan thereupon took out a Summons in Chambers to have the trustees' Originating Summons set aside on the ground of his immunity as an independent ruler from the jurisdiction of the High Court of Singapore. Mr. Justice Gordon-Smith gave judgment against the Sultan holding that although he had certain attributes of sovereignty, he had waived his privileges by instituting proceedings in the Japanese Court during the occupation. The Sultan appealed against this judgment. The Court of Appeal dismissed the appeal.

Per Murray-Aynsley, C.J., Singapore: The question of status cannot be ascertained by the examination of treaties or constitutions or such documents; it is not a question of the powers and authority of the 'person' whose status is examined but the extent to which it is recognised by His Majesty. And for that recognition, a statement made on behalf of His Majesty is the only form which the Court will notice judicially.

Per Willan, C.J., Federation of Malaya: The Sultan by instituting proceedings in the Japanese Court submitted to the jurisdiction of that Court; and by virtue of the Japanese Judgments and Civil Proceedings Ordinance 1946, the proceedings brought by the trustees in the High Court of the Colony of Singapore are a continuation of the proceedings instituted by the Sultan in the Japanese Court and thereby the claim of the Sultan of immunity from jurisdiction of the High Court of the Colony fails.

Per Evans, J.: These proceedings appear to be one concerning land which is undoubtedly within the jurisdiction and which is the subject of a private and personal claim of the Sultan and not a claim of public property of the State. In such a case, it seems to me that the Sultan is subject to the jurisdiction of this Court.

Cases referred to:—

- (1) *Mighell v. Sultan of Johore* (1894) 1 Q.B.D. 149.
- (2) *Duff Development Co. v. Kelantan Government* (1924) A.C. 797.
- (3) *City of Berne v. The Bank of England* 9 Ves. Jun. 347.
- (4) *Thompson v. Barclay* 6 L.J. O.S. Ch. 93.

- (5) *Yrisarri v. Clement* 2 C. & P. 101.
- (6) *Foster v. Globe Venture Syndicate* (1900) 1 Ch. 811.
- (7) *Statham v. Statham* (1911) P. 92.
- (8) *The Annette* (1919) P. 111.
- (9) *Luther v. Sagor* (1921) 1 K.B. 456; on appeal (1921) 3 K.B. 532.
- (10) *Gelston v. Hoyt* (1818) 3 Wheat. 246.
- (11) *Lee Quee Siew v. Lim Hock Siew* 3 S.S.L.R. 85.
- (12) *In re the Republic of Bolivia Exploration Syndicate Ltd.* (1914) 1 Ch. 139.
- (13) *The Charkieh* L.R. 4 A. & E. 59.
- (14) *The Pahang Consolidated Company Limited v. The State of Pahang* (1931-1932) F.M.S.L.R. 390.
- (15) *Strousberg v. Republic of Costa Rica* 44 L.T. 199 at p. 200.
- (16) *The Parlement Belge* (1879-1880) 5 P.D. 197.
- (17) *Republic of Peru v. Dreyfus* 38 Ch. D. 348.
- (18) *Sekgome's Case* (1910) 2 K.B. 376.
- (19) *Buron v. Denman* 2 Ex. 167.
- (20) *Burns v. Siemens Brothers* (1919) 1 Ch. 225.
- (21) *Gladstone v. Musurus Bey* 1 Hem. & M. 495.
- (22) *The Jupiter* (1924) P. 236.
- (23) *Neelkish Deb Burmono v. Beerchunder Thakoor* 12 Moores (I.A.) 523.
- (24) *Nairne v. Rajah of Quedah* 1 Kyshe 145.
- (25) *Abdul Wahab v. Sultan of Johore* 1 Kyshe 298.
- (26) *Moraiss & ors. v. De Souza*, 1 Kyshe 27.
- (27) *Mayor of Lyons v. East India Company* 1 Moore P.C.C. 275.

COURT OF APPEAL.

E. D. Shearn and Kenneth Seth for the Appellant.

John Laycock and Dennis Murphy for the Respondents.

Murray-Aynsley, C. J. Singapore:— The circumstances which bring this matter before the Court are explained in the judgment appealed against. It is not, I think, necessary to set them out at length. The first question is whether the status of the appellant is such as to oust the jurisdiction of this Court. If that question is answered in the affirmative, the other question arises as to whether he has submitted to the jurisdiction.

In order to obtain information on the first point letters were addressed to the Secretary of State for the Colonies. The answers thereto are set out in the record. It is conceded that the terms of the answers are not such as to constitute an answer in the affirmative as were the answers in the cases of *Mighell v. Sultan of Johore*⁽¹⁾ and *Duff Development Co. v. Kelantan Government*⁽²⁾. It was argued on behalf of the respondents that unless the appellant, on whom lies the burden of establishing his status, can produce evidence of recognition of his status by His Majesty's Government he has not discharged that burden. That means that the question of status cannot be ascertained by the examination of treaties or constitutions or such documents, that it is not a question of the powers and authority of the person whose status is examined but the extent to which it is recognized by His Majesty. And of that recognition a statement made on behalf of His Majesty is the only form which the Court will notice judicially.

Since the *Kelantan case* the affirmative proposition that a recognition of sovereignty by His Majesty's Government is conclusive is fully established. It has to be established that the converse proposition that the Courts cannot treat any government as sovereign and independent unless it is so recognized by His Majesty's Government is also law. I should have thought that as a matter of reason and expediency that must be the case. It is also, in my opinion, supported by authority. Among the older cases the *City of Berne v. The Bank of England*⁽³⁾ seems to me to be entirely in point; so does *Thompson v. Barclay*⁽⁴⁾. In the former Lord Eldon said that it was extremely difficult to say, a judicial Court can take notice of a Government, never authorized by the Government of the country. In the latter Shadwell, V.C., said "the courts cannot acknowledge them till the Government of the country has recognized them". It appears to me that it can make no difference whether it is the recognition of a new government set up by a revolution or the recognition of the status of an established government. The authority to the contrary is *Yrisarri v. Clement*⁽⁵⁾. This was only a *nisi prius* case and in my opinion cannot be regarded as law in so far as it purports to decide that the Courts can treat a body as a government of a country when not so recognized by His Majesty's Government. Roche, J. ignored it though it was cited. I think he was right.

The modern practice in this matter dates from *Mighell's case*. There Lord Esher said at p. 158:—

"When once there is an authoritative certificate of the Queen through her minister of state as to the

status of another sovereign, that in the Courts of this country is decisive."

Kay, L.J., said, at p. 162:—

"Proceeding as it does from the office of one of the principal secretaries of state, and purporting to be written by his direction, I think it must be treated as equivalent to a statement by Her Majesty herself, and, if Her Majesty condescends to state to one of her Courts of Justice, that an individual cited before it is an independent sovereign, I think that statement must be taken as conclusive."

In *Foster v. Globe Venture Syndicate*⁽⁶⁾, Farwell, L.J., reasoned in the same way. Since then all these cases have been decided in this way and with the possible exception of *Statham v. Statham*⁽⁷⁾ no case has occurred in which a plea of this kind to the jurisdiction has been allowed except on the strength of a letter from the Secretary of State or of a statement in the face of the Court by the law officers of the Crown. It appears to me that logically a statement that, as in the present case, does not amount to an unqualified affirmative or negative answer should, for this purpose, be treated as negative. There is authority in this sense. In the *Annette*⁽⁸⁾, Hill, J. said:—

I am asked to infer from that that it has been informally recognized as a sovereign state. I do not think that I ought to draw that conclusion. I must be satisfied before I can recognize the Provisional Government of Northern Russia as a sovereign state, for the purposes of this case, that the British Government so recognize it. I am not satisfied.

Luther v. Sagor⁽⁹⁾ is I think the most valuable case. When heard at first instance by Roche, J., as he then was the converse proposition with which I am dealing was relevant, and it was fully considered by that learned Judge. He sets out the matter clearly, (p. 474):—

The attitude proper to be adopted by a Court of this country with regard to foreign governments or powers I understand to be as follows: (1) if a foreign government is recognized by the Government of this country the Courts of this country may and must recognize the sovereignty of that foreign government and the validity of its acts (see *Republic of Peru v. Dreyfus* and the cases there cited); (2) if a foreign government, or its sovereignty, is not recognized by the Government of this country the Courts of this country either cannot, or at least need not, or ought not, to take notice of, or recognize such foreign government or its sovereignty. This negative proposition is, I think, also established and recognized by the judgment of Kay, J. in *Republic of Peru v. Dreyfus*, 38 Ch.D. 348.

Earlier he had said at p. 473:—

The proper source of information as to a foreign power, its status and sovereignty, is the Sovereign of this country through the Government..... At all events, even if I were entitled to look elsewhere for information I am certainly not bound to do so.

The learned Judge considered the earlier authorities and cited the American case of *Gelston v. Hoyt*⁽¹⁰⁾ in which the following words occur:—

No doctrine is better established than that it belongs exclusively to Governments to recognize new States in the revolutions that may occur in the world.

He concluded :—

On these materials I am not satisfied that His Majesty's Government has recognized the Soviet Government as the Government of a Russian Federative Republic or of any sovereign state or power.

This case is, like the *Annette*, of great help in the present case because in both those cases information had been sought from a Government Department and in both cases an inconclusive answer had been given.

I must deal briefly with *Statham v. Statham*. There was no certificate. Use was made of a certificate (given in another proceeding) as defining the status of the person cited, the Gaekwar of Baroda. The Judge, besides considering the certificate, considered the history of Baroda. In the end the Judge held that the Gaekwar of Baroda was not subject to the jurisdiction. The reasons for so doing are not clear. But the decision appears to be considered by the Judge to be in conformity with the certificate. To me it appears that if the Judge purported to decide in accordance with the certificate he was wrong, because the certificate says "though His Highness is thus not independent". I should have thought that independence was essential. If he purported to decide otherwise than by the certificate he was wrong also.

Consideration was given to this matter in the *Kelantan* case. It should be noted that there was in that case a conclusive certificate so that discussion on this point was *obiter*. There seems to have been a great divergence of opinion among the Lords who heard the case. Lord Sumner gave most space to the matter and his opinion is clearly contrary to the one I have formed. I must therefore give serious consideration. However, the other Lords do not seem to have agreed. He says, at p. 824 :—

It is the prerogative of the Crown to recognize or to withhold recognition from States or chiefs of States, and to determine from time to time the status with which foreign powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English Court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed.

If the first part of the passage is correct I should have thought that such a statement would of necessity have been the only possible evidence. Later he says at p. 825 :—

I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the Court might be entitled to accept secondary evidence in default of the best

It is submitted that in case of status (as distinct of boundaries, which Lord Sumner seems to have had chiefly in mind) no other evidence is possible, because as he had said earlier, it is evidence of recognition by His Majesty's Government that is needed, not evidence of authority on the part of the ruler.

Lord Cave said at p. 808 :—

No doubt the engagements entered into by a State may be of such a character as to limit and qualify, or even to destroy, the attributes of sovereignty and independence; and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises it is desirable that it should be determined, not by the Courts, which must decide on legal principles only, but by the Government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British Government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as a sovereign in our Courts.

I should have thought that recognition or non-recognition was the only question and that, once it is conceded that the Crown can decide the question on other than legal principles, then it is clearly not a question that the Courts can decide on legal principles. No one has ever ventured to set out the legal principles on which the matter may be decided. I think the reason for the absence of authority as to the point at which sovereignty is lost by a protective alliance or by merger in a federation is that it is not a legal question at all but a political one.

Lord Finlay said, at p. 813 :—

It is settled law that it is for the Court to take judicial cognizance of the status of any foreign Government. If there can be any doubt on the matter the practice is for the Court to receive information from the appropriate department of His Majesty's Government, and the information so received is conclusive. The judgment of Farwell, J. in *Foster v. Globe Venture Syndicate* seems to me to be a perfectly accurate statement of the law and practice on this point. There are a great many matters of which the Court is bound to take judicial cognizance, and among them are all questions as to the status..... of foreign powers. In all matters of which the Court takes judicial cognizance the Court may have recourse to any proper source of information. It has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance.

Later he said (p. 814) :—

We are asked to say that it is for the Court and for this House in its judicial capacity to decide whether these restrictions were such that the Sultan had ceased to be a sovereign. We have no power to enter into any such inquiry.

Further he said at p. 816 :—

"But, as I have said, the question is not for us at all; it has been determined for us by His Majesty's

Government, which in such matters is the appropriate authority by whose opinion the Courts of His Majesty are bound to abide."

It is to be noted that Lord Finlay expressly approved the judgment of Farwell, J. which had been criticised by Lord Sumner.

Lord Dunedin, at p. 820 :—

It seems to me that once you trace the doctrine for the freedom of a foreign sovereign from interference by the Courts of other nations to comity, you necessarily concede that the home sovereign has in him the only power and right of recognition.

Lord Carson said, at p. 830 :—

Indeed, it is difficult to see in what other way such a question could be decided without creating chaos and confusion, the more especially so when we consider that 'many states, regarded as sovereign, do not exercise the right of self-government entirely independent of other States, but have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, by stipulations of unequal treaties of alliance, or by treaties of protection or of guarantee made by a third power'. And, in truth, it is the recognition of the status of the Government which must be the main element to determine this question; the only proper evidence of which can be supplied by the officer representing the Crown.

Considering the present case in the light of this, it must be observed that until 1945 the rulers of Johore were immune from the jurisdiction of British Courts; the same degree of recognition had been granted to Kelantan. Presumably it would also have been granted to the other Unfederated States. The matter had never arisen in the case of any of the Federated States.

Since then the status of Johore and of its ruler has been changed twice. The first time in 1945, the second time in 1948. I think that we are only concerned with the latter, but having regard to the views I have expressed of the position of the Courts in this matter the result is the same in either case. But in any event the slightest examination of the treaties and Orders in Council that have been made in 1945 and since will show that the changes have been of such a character that earlier recognition does not necessarily imply recognition now.

That is sufficient to dispose of the matter. Certain other matters have been raised in argument. One point taken is that as this is in substance a claim to land within the jurisdiction the question of immunity does not arise. There is no English authority on the point. The matter has been debated by theoretical writers. It seems that if suits for land within the jurisdiction do not form an exception grave difficulties might arise. But the present case is only incidentally concerned with land, and therefore not within the exception, if such an exception exists.

In view of what I have said on the question of sovereignty it is not necessary for me to go into the question of waiver. But as this Court is not unanimous I think that it is desirable that I should express my views on this point.

It must be considered whether the appellant, though exempt from the jurisdiction, had nevertheless voluntarily submitted to it. The submission in this case, if any, is by the institution of proceedings in the Japanese Court. For this it is necessary to consider what constitutes a submission. The simplest case is where an appearance is entered without protest. There must be an actual submission. An agreement to submit is not enough, nor can there be submission by estoppel or by conduct other than conduct before the Court to which the submission is made.

Where the foreign sovereign has taken proceedings the person sued can take all steps open to a litigant in ordinary cases, e.g. under the old procedure he could institute ancillary proceedings by way of a bill for discovery. If he is unsuccessful at first instance he can, I assume, appeal. I assume further that he can proceed by motion for a new trial under Order 37.

The matters alleged by the respondents in the present case are matters which would have constituted a defence to the original proceedings; it is not therefore necessary to explore the difficult question as to the extent to which a defendant in such a case can proceed by counterclaim.

The matter has, I think correctly, been put forward on behalf of the appellant in the form of three propositions: that there must be identity of parties, identity of Court, identity of proceedings. The absence of any one of these three would be decisive.

As regards parties, the defendant in the Japanese proceedings was the Japanese custodian of enemy property who allowed judgment to be given in favour of the present appellant without any opposition. His attitude is explained by the following passage in the judgment of the Japanese judge: "His Excellency the Mayor of Syonan was represented by his Deputy Custodian of Enemy Property and the attitude which he takes is this: in his view, this is a *prima facie* enemy property and as such the Custodian can dispose of it in any manner that he thinks fit and proper". That is, the property was regarded as loot which the Japanese Government could give away to whom they chose. There was no question of representation of the absent owners. The respondents would not be bound.

As regards the identity of the Court, it should be noted that there have been established in this city three distinct Courts. Before the Japanese conquest there was the Supreme Court of the Straits Settlements. During the period of their occupation the Japanese purported to annex the Settlement of Singapore and treated it as Japanese territory. They established a court which took the place of the existing Supreme Court but it was a Japanese Court and the proceedings were in the name of the Emperor of Japan. None of the previous Judges functioned. The Japanese appointed a Japanese Judge and several others. The old procedure was followed and in some cases also the existing law. In the proceedings under review the existing law of the Straits Settlements was deliberately not applied.

After the re-occupation and a period of military rule a third Court was established. By the Singapore Order in Council a Supreme Court of Singapore was created. By Clause 44 it was provided as follows:—

All proceedings (other than proceedings in the Prize Court) commenced before the 15th day of February, 1942, in any Court of Justice in or having jurisdiction in, the territory comprised in the Colony may be carried on in like manner as nearly as may be, as if this Order and the Act of 1946 had not been made or passed but in the corresponding Court of the Colony, and any such proceeding may be amended in such manner as may appear necessary or proper in order to bring it into conformity with the provisions of the Act of 1946 and of this Order.

It will be seen that there was no analogous provision with regard to proceedings before the Japanese Court. It was only by reason of special statutory provision in the Japanese Judgments and Civil Proceedings Ordinance that the new Supreme Court could take any cognizance of Japanese judgments except possibly as foreign judgments.

By that Ordinance Japanese proceedings were not adopted *en masse*. A certain validity was given in individual cases on application being made.

In these circumstances I am unable, in spite of the views of the learned Judge who tried the case at first instance, to consider the present Supreme Court as the same Court as that which functioned during the Japanese occupation.

The third proposition enunciated on behalf of the appellant is that the proceedings must be the same. These proceedings are of a special character based on statute, i.e. section 3(1) of the Ordinance above mentioned. Apart from that statute these proceedings could not have been taken at all. It should be noted that it enables "any person aggrieved to apply". This is the present case. It seems to me that this must be as far as the present Court is concerned a

new proceeding. Before an application is made there is nothing before the Court at all. It seems to me to be as new as proceedings to enforce a foreign judgment. If it were to be regarded as a continuation of existing proceedings statutory provision to that effect would have to be made. I do not think that this turns on any technicality such as the fact that by the rules made under the Order the respondents had to proceed by originating summons, or the fact that they effected service on the appellant and not on the solicitor on the record of the Japanese proceedings.

On the assumption that these three propositions represent an accurate view of the law I do not consider that there has been any submission by the appellant to the jurisdiction.

I should like to call attention to a point of practice. It is clear from Order 55 r. 7 that unless the respondent to an appeal wishes to have the decision of the Court below varied he is not obliged to give any notice of a cross appeal. He is nevertheless entitled to support the decision on grounds other than those given in the judgment appealed from. Some difficulty seems to have been caused by certain observations in the case of *Lee Quee Siew v. Lim Hock Siew*⁽¹¹⁾. If the Judges there intended to lay down anything to the contrary we consider that their ruling is no longer law.

Willan, C. J. (F.M.) :— This is an appeal from the decision of Gordon Smith J. on a summons in chambers to set aside and stay proceedings brought against His Highness the Sultan of Johore (hereinafter in this judgment referred to as "the Sultan") in the High Court of the Colony of Singapore, on the ground that the Sultan is a sovereign ruler.

The facts are as follows:—

- (1) On the 1st of December, 1903, the Sultan by an Indenture of Conveyance, conveyed to his wife (described in that Indenture as Inche Rugiah) two pieces of land situate in the Island of Singapore.
- (2) In 1926 Inche Rugiah died intestate and letters of administration to her estate were granted by the Supreme Court of the Straits Settlements to Tungku Abubakar, son of the Sultan and Inche Rugiah. Tungku Abubakar, as her son, was entitled under the intestacy to three-fourths of her estate, and the Sultan, as her husband, to the remaining one-fourth.
- (3) On the 22nd of December, 1926, by an Indenture of Settlement made between the Sultan and Tungku Abubakar, these two pieces of land were conveyed to the Sultan upon the trusts therein declared, and the Sultan declared that he would stand possessed of the property upon trust for the eldest daughter of the said Tungku Abubakar during her life, and after her decease upon trust for any of her issue living at her decease. By various deeds these lands became vested in three trustees—Tungku Abubakar, Henry Walter Cowling and George Herbert

Garlick (hereinafter in this judgment referred to as "the Trustees").

- (4) During the Japanese occupation of Malaya, when none of the Trustees was present in Malaya, the Sultan applied by Originating Summons No. 24 of 2605 (1945 A.D.) dated the 3rd of May 2605, to the Court of a Judge at Syonan (Singapore) asking for the construction of the terms of the two Indentures dated the 1st December, 1903, and the 22nd December, 1926, more particularly as to whether such Indentures had been properly and lawfully executed since the parties thereto were Mohammedans, and whether, according to Mohammedan Law, such Indentures were "bad and void". In the event of such Indentures being declared invalid the Sultan asked for an order that the two pieces of land should revert to him.

The Japanese Custodian of Enemy Property was cited as defendant to that application, but he did not appear at the hearing, which was *ex parte*.

- (5) That application was heard on the 18th of June, 2605, by an Advocate and Solicitor of the Supreme Court of the Straits Settlements, who had been appointed a Judge by the Japanese Military Authorities as the Occupying Power. He declared in his judgment that the said two Indentures were invalid and ordered that the land should revert to the Sultan as sole beneficial owner thereof.
- (6) The Sultan extracted that Court order and registered it against the two pieces of land during the Japanese occupation.
- (7) On the 14th April, 1947, the Trustees applied in the High Court of the Colony of Singapore by Originating Summons No. 23 of 1947 under the Japanese Judgments and Civil Proceedings Ordinance, 1946, for an order that the decree obtained by the Sultan during the Japanese Occupation be set aside or, alternatively, that they should be allowed to appeal against that decree on the grounds that—
- (a) the necessary parties did not appear personally in the proceedings leading up to that decree and that the Trustees were represented by a person appointed by some Japanese Authority and that such person did not appear on the hearing of those proceedings;
 - (b) such decree is based on principles unknown to the existing laws of the Colony of Singapore; and
 - (c) such decree is erroneous and bad in law.
- (8) On the 11th October, 1947, the Sultan applied by summons in chambers to set aside all proceedings and stay all further proceedings on the Originating Summons filed by the Trustees on the ground that he is a sovereign ruler and therefore not subject to the jurisdiction of the Court of the Colony of Singapore.
- (9) That Summons in Chambers was heard in open Court by Gordon Smith, J., who delivered judgment on the 7th April, 1949, and held:—
- (a) That the Sultan is a sovereign ruler and, as such, is not subject to the jurisdiction of the Supreme Court of the Colony of Singapore, unless he had submitted to such jurisdiction.
 - (b) That the Sultan did submit to the jurisdiction of that Court by presenting Originating Summons No. 24 of 2605 and obtaining a decree thereon because Originating Summons No. 23 of 1947, filed by the Trustees, is not a new proceedings, but a continuation, authorised by the Japanese

Judgments and Civil Proceedings Ordinance, 1946, of the proceedings commenced by Originating Summons No. 24 of 2605, filed by the Sultan.

- (10) The Sultan appealed against finding (b), and on the hearing of the appeal the Trustees, as respondents to the appeal, contended that finding (a) is wrong.

Accordingly, the two points for decision in this appeal are:—

- (A) Is the Sultan a sovereign ruler and, as such, immune from the jurisdiction of the Supreme Court of the Colony of Singapore?
- (B) If the answer to question (A) is in the affirmative, has the Sultan waived his privileges as a sovereign ruler?

On the hearing of the appeal Mr. Shearn, with him Mr. Seth, appeared for the Sultan, and Mr. Murphy for the Trustees.

After the appeal had been filed by the Sultan, the Trustees gave notice of cross-appeal regarding the finding by Gordon Smith J. that the Sultan is a sovereign ruler. Such notice purported to be given under O.55 r. 7 of the Rules of the Supreme Court, which reads:—

7. (1) It shall not be necessary for a respondent to give notice of appeal, but if a respondent intends, upon the hearing of an appeal, to contend that the decision of the Court below should be varied, he shall, within ten clear days before the sitting of the Court of Appeal, give notice of cross-appeal, specifying the grounds thereof, to the appellant and any other party who may be affected by such notice, and shall file a copy of such notice, accompanied by copies thereof for the use of the Judges of the Court of Appeal.

(2) If he fails to give such notice within the time prescribed, he shall not be allowed, except by leave of the Court, to contend on the hearing of the appeal that the decision of the Court below should be varied; but the Court may in its discretion, and subject to terms as to costs, adjournment or otherwise, hear any such contention.

Mr. Murphy stated that notice of cross-appeal had only been given on account of the decision in *Lee Quee Siew v. Lim Hock Siew*⁽¹¹⁾ which decided under section 8 of the Straits Settlements Civil Appeals Ordinance, 1893—similar in terms to O.55 r. 7—that if a respondent desired to support the judgment of a Court of first instance on legal grounds which the Court below decided in favour of the appellant, the respondent must give notice by way of cross-appeal to the appellant.

Both Mr. Shearn and Mr. Murphy agreed that where a respondent desires to support a decision of the Court below on a ground which has been decided in favour of the appellant, such respondent can do so without filing any notice of cross-appeal because he would not be seeking to vary the decision of the Court below. That being so it was open to the Trustees to submit to this Court, irrespective of any cross-appeal, that the

decision of Gordon-Smith J. could be supported on the ground that the Sultan is not a sovereign ruler.

In my view the decision in the case of *Lee Quee Siew v. Lim Hock Siew supra* is not good law and should not be followed.

Before discussing the two questions (A) and (B) set out above, it is necessary to describe the recent constitutional changes which have taken place in Singapore.

Prior to the Japanese occupation of Malaya Singapore was part of the Straits Settlements, and its Court of record was known as the Supreme Court (that is the Court of Appeal and the High Court) of the Straits Settlements.

The Japanese occupied Singapore and the rest of Malaya from February, 1942, to the beginning of September, 1945. This was followed by a period when Singapore and the rest of Malaya were administered by a British Military Administration.

On the 1st April, 1946, a separate and new Colony was created by the Singapore Colony Order in Council, 1946. That Colony is known as the Colony of Singapore. By section 14 of the Order in Council the Supreme Court of the Colony of Singapore was established, and that is the Court which has been functioning in the Colony of Singapore since the 1st April, 1946.

The connecting link between proceedings in the former Supreme Court of the Straits Settlements and those in the Supreme Court of the Colony of Singapore is supplied by section 44 of the Order in Council, which reads :—

All proceedings (other than proceedings in the Prize Court) commenced before the 15th day of February, 1942, in any Court of Justice in or having jurisdiction in, the territory comprised in the Colony may be carried on in like manner as nearly as may be, as if this Order and the Act of 1946 had not been made or passed but in the corresponding Court of the Colony, and any such proceeding may be amended in such manner as may appear necessary or proper in order to bring it into conformity with the provisions of the Act of 1946 and of this Order.

As regards the Court which pronounced the decree in favour of the Sultan during the Japanese occupation, Gordon Smith J. found that "it is exactly the same Court that is continuing to function today". In other words, he found that the High Court functioning in Singapore during the Japanese occupation is exactly the same Court as the High Court of the Colony of Singapore. He came to this conclusion because, to use his own words :—

Although the Japanese may have called the Court by a slightly different name, there is no evidence or information before me that they passed any amending

legislation whatsoever either altering the name of the previous High Court or making any alteration in its constitution, jurisdiction or powers or its procedure, and I understand that such Court, certainly in its civil jurisdiction, carried on exactly the same as prior to the surrender, with many of the same personnel employed as previously. The Judge who gave the decision was previously a practising Advocate of the Colony and was appointed to be a Judge by the Japanese, and similar appointments had been made prior to the surrender and have been made since the re-occupation.

Admitting all those facts stated I am unable to agree with the finding thereon.

When a country is occupied, the Occupying Power imposes his will in place of the legitimate Government. In *Hall's International Law*, 6th edition, the learned author, at page 465, states :—

On occupying a country an invader at once invests himself with absolute authority; and the fact of occupation draws with it as of course the substitution of his will for previously existing law whenever such substitution is reasonably needed, and also the replacement of the actual civil and judicial administration by military jurisdiction.

Again, at page 471 of the same work, the following passage appears :—

It has been seen that the authority of the local civil and judicial administration is suspended as of course as soon as occupation takes place.

The Japanese Military Authorities interned all the Judges of the Supreme Court of the Straits Settlements and replaced them by their own appointees. But, admitting all the facts stated by Gordon Smith J. in his judgment, the High Court which functioned in Singapore during the Japanese Occupation was the Court of the Occupying Power—i.e. a Japanese Court, which functioned under the will of that Occupying Power, and, in my opinion, it is not the same Court as the High Court of the Colony of Singapore. I have thought it convenient to state this at the beginning of this judgment before I come to deal with the two questions (A) and (B) set out above.

As regards question (A), that is whether the Sultan is a sovereign ruler and, as such, immune from the jurisdiction of the Supreme Court of the Colony of Singapore, I must first make reference to certain correspondence with His Majesty's Secretary of State for the Colonies.

Prior to the hearing of the Summons in Chambers dated the 11th October, 1947, the Judge in the Court below enquired from the Secretary of State whether the Sultan was or was not an independent sovereign ruler. As a result of that enquiry two letters in reply were received from the Secretary of State, the first dated the 9th June, 1948, and the second dated the 12th November, 1948. These two letters are set out *in extenso* in an Appendix to the judgment of Gordon

Smith J. It is sufficient to say that neither of those two letters gives an unequivocal answer to the question put.

On the 28th June, 1949, when this appeal was pending, the Sultan himself wrote the following letter to the Secretary of State :—

Dear Mr. Creech Jones,

On the 9th June, 1948, you wrote to the Hon. Mr. Justice T. A. Brown of Singapore, with regard to my status as an Independent Sovereign Ruler, in connection with certain proceedings taken in my country. (This is obviously a mistake—the proceedings were taken in the Colony of Singapore). That letter was unfortunately couched in very vague terms, and merely stated facts known to everybody, but without expressing any opinion as to their effect upon my position.

It is extremely important that I should now have a letter, or certificate, from you stating in unequivocal terms that, under existing Agreements with His Majesty, I am an independent Ruler, and recognised as such by His Majesty. There can, I take it, be no question about this, and I shall be grateful if you can let me have such a letter as I require, at your earliest convenience.

An appeal from the Proceedings in Johore (sic) is due to come on for hearing about the 18th July next, and it is vital that my Legal Advisers should have the letter in their hands before that date.

Sincerely Yours,

Sgd: IBRAHIM.

The Sultan received the following reply from the Secretary of State for the Colonies, dated the 11th July, 1949 :—

Your Highness,

Thank you for your letter of the 28th June. I had waited for your arrival in this country to reply to your letter of the 3rd April on the subject of your Highness's status.

Your Highness will know that on the certificate which I gave to the Court Mr. Justice Gordon-Smith found that you enjoy your former status of a sovereign ruler. This seems clearly to mean that you are an independent sovereign (subject to the limitations mentioned by the Judge), and His Majesty's Government, of course, accept the ruling. I trust that Your Highness will now regard the matter as satisfactorily settled. I am informed that the only matter which is now sub judice in the lawsuit in which Your Highness is concerned is the question whether Your Highness had submitted to the jurisdiction of the Court, so that the question of your sovereignty appears to be no longer an issue in the proceedings.

Yours Sincerely,

Sgd: A. CREECH JONES.

At the hearing of this appeal Mr. Shearn read these two letters and claimed that the reply from the Secretary of State for the Colonies showed conclusively that His Majesty's Government recognised the Sultan as an independent sovereign.

Mr. Murphy disputed this and suggested, that in order to clarify the position, this Court should address an inquiry to the Secretary of State for the Colonies.

Mr. Shearn did not object to this course. Accordingly this appeal was adjourned for the President of the Court to make this inquiry, which he did by letter dated the 29th July, 1949, addressed to the Secretary of State for the Colonies containing the following question :—

Does your letter Y of the 11th July, 1949, mean that His Majesty's Government recognises His Highness the Sultan of Johore as an independent sovereign?

On the 20th August, 1949, the Secretary of State replied to that question in the following terms :—

Sir,

I have the honour to refer to your letter of the 29th July, 1949, and to state as follows:

Subsequent to my letter of the 11th July, there was further correspondence regarding the status of His Highness and I enclose copies of a letter addressed to him on the 13th July, and four letters dated respectively the 13th, 18th, 18th and 27th July, which passed between His Highness's solicitors and the Colonial Office.

On the 9th May, I was informed that His Highness the Sultan of Johore had lodged an appeal in these proceedings, but that the time for lodging appeals had expired on the 28th April, and that there was no cross-appeal on the question of sovereignty. I concluded therefore that that question could no longer be sub judice. It was only on the 23rd July that (in response to a telegraphic enquiry made by myself on receipt of the letter of the 18th July from His Highness's solicitors) I was informed officially that a cross-appeal on the question of sovereignty had been filed. It will be appreciated, therefore, that my letter of the 11th July to His Highness the Sultan was written under a misapprehension. It was not intended to convey more than that His Majesty's Government accepted the decision of the Court, which I believed was not being further contested, and the letter was not intended to affect the decision of any higher Court before whom the question might come on appeal.

I have etc.,

Sgd: A. CREECH JONES.

Accordingly this Court is in the same position as Gordon Smith J. was in the Court below, i.e. that there is no unequivocal answer from His Majesty's Government as to the status of the Sultan.

The first point I must deal with on this question of sovereignty is the contention of Mr. Murphy that Gordon Smith J. was wrong in holding that the material time when the status of the Sultan should be determined is when the proceedings brought by him objecting to the jurisdiction of the Court (the Summons in Chambers dated the 11th October, 1947) were heard in the Court below on the 15th to 18th March, 1949. Mr. Murphy argued that the learned trial Judge should have determined the status of the Sultan on the 28th August, 1947, the date on which the Originating Summons of the 14th April, 1947, filed by the Trustees, was served.

The significance and importance of this is that on the 1st February, 1948, there was a change in the constitution of the territory now known as the Federation of Malaya. Prior to that date this territory was known as the Malayan Union (of which the State of Johore was a part) established under the Malayan Union order in Council, 1946. On the 1st February, 1948, the Malayan Union Order in Council, 1946, was revoked by the Federation of Malaya Order in Council, 1948, and from that date the State of Johore became a part of the Federation of Malaya established by clause 3 of the Federation of Malaya Agreement, 1948.

Mr. Murphy stated that he could not produce any authority exactly in point, but relied mainly on the following two passages from the judgments in *Mighell v. Sultan of Johore*⁽¹⁾. The first, at page 155, reads:—

If anything turned upon the question of fact, I should say that it was not shewn that in August, 1893, when this writ was issued, he was here otherwise than as a sovereign prince.

The second, at pages 163 and 164, reads:—

The passage cited from Vattel by Lopes, L.J., is emphatic on this very point, and shows that the time at which immunity is to be waived must be when an action is brought against a foreign sovereign, and when it is brought to the attention of the Court by reason of its judicial knowledge or from other information that the person sued is a foreign sovereign. I should put it thus: the foreign sovereign is entitled to immunity from civil proceedings in the Courts of any country, unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction.

Mr. Shearn, on the other hand, cited the case of *In re the Republic of Bolivia Exploration Syndicate Limited*⁽¹²⁾. At page 155, Astbury J. explains the meaning of the second passage in *Mighell v. Sultan of Johore*, set out above, and also explains a passage from the judgment of Lopes L.J. at page 161 of the same case. The explanation given by Astbury J. reads:—

'Lopes, L.J. said 'In my judgment, the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, by appearance to a writ'. He does not of course mean by mere appearance, but by appearance and subsequent proceedings. Kay, L.J. said 'The foreign Sovereign is entitled to immunity from civil proceedings in the Courts of any other country, unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction'.

In my view the emphasis is on the words "unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction".

How can it be said in this case that the Sultan did that? The facts are that he took active steps to claim that he was an independent sovereign immune

from the jurisdiction of the Court of the Colony of Singapore, by taking out a summons in chambers disputing such jurisdiction when he had been served with the Originating Summons filed by the Trustees.

Further, reverting to the second passage from the judgment in *Mighell v. Sultan of Johore* set out above, I would draw particular attention to the following part of that passage:—

Shews that the time at which immunity is to be waived must be when an action is brought against a foreign sovereign, and when it is brought to the attention of the Court by reason of its judicial knowledge or from other information that the person sued is a foreign sovereign.

In this case it was brought to the attention of the Court that the Sultan was claiming to be a sovereign when the papers, that is the Summons in Chambers filed by the Sultan, were sent from the Supreme Court Registry to the trial Judge for him to hear and determine this matter. Therefore the trial Judge's attention was brought to bear on it at that time and not earlier.

To hold, as Mr. Murphy wishes me to do, would mean, as instanced by Mr. Shearn, that if an action was commenced against the Crown Prince of a country whilst he was Crown Prince, and, prior to the hearing of the action he succeeded to the throne of that country on the death of the previous sovereign ruler, he would not be able to claim privilege from the jurisdiction of the Court as a sovereign ruler. This would be contrary to the comity of nations.

In my view this particular question is put beyond doubt by the decision in the case of *Aksionairnoye Obschestvo A.M. Luther v. James Sagor and Co.*⁽⁹⁾. That was an appeal against the decision of Roche J., reported at (1921) 1 K.B. 456, who held that on the materials supplied to him by His Majesty's Government he was not satisfied that that Government recognised the Government of the Soviet Republic. At the hearing of the appeal preferred against that decision further materials were produced before the Court of Appeal showing that after the decision of Roche J. and before the hearing of the appeal His Majesty's Government did recognise the Government of the Soviet Republic. On that ground the Court of Appeal reversed the decision of Roche J. That case is fatal to the argument put forward by Mr. Murphy.

As regards the materials on which the Court should decide whether the Sultan is a sovereign ruler or not, Mr. Murphy contended that the Court is not entitled to go beyond the letters addressed by the Secretary of State for the Colonies to the Court below and to this Court—i.e. the three letters already

referred to dated the 9th June, 1948, the 12th November, 1948, and the 20th August, 1949. His argument was that since in none of those letters has the Secretary of State for the Colonies stated unequivocally that His Majesty's Government recognises the Sultan as a sovereign ruler—which is true—the Court has no power to go outside those letters. In short, Mr. Murphy's contention was that if there is no conclusive certificate showing recognition by His Majesty's Government, the Court has no power to decide the question.

Although the Federation Agreement, 1948, and the Johore Agreement, 1948, are mentioned in, and copies thereof enclosed with, the first letter from the Secretary of State for the Colonies dated the 9th June, 1948, Mr. Murphy argued that the Court is not entitled to look at those Agreements in deciding this question of sovereignty.

In support of his arguments Mr. Murphy referred to the following passage from the judgment of Lord Esher M.R. in *Mighell v. Sultan of Johore*⁽¹⁾ at page 158 :—

The first point taken was that it was not sufficiently shewn that the defendant was an independent sovereign ruler. There was a letter written on behalf of the Secretary of State for the Colonies, on paper bearing the stamp of the Colonial Office, and which clearly came from the Secretary of State for the Colonies in his official character. He is in colonial matters the adviser of the Queen, and I think the letter has the same effect for the present purpose as a communication from the Queen. It was argued that the Judge ought not to have been satisfied with that letter, but to have informed himself from historical and other sources as to the status of the Sultan of Johore. It was said that Sir Robert Phillimore did so in the case of *The Charkieh*. I know he did; but I am of opinion that he ought not to have done so; that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive.

Mr. Murphy also referred to the following passage from the judgment in *Aksionairnoye Obschestvo A.M. Luther v. Sagor*⁽⁹⁾ at pages 473 and 474 :—

The proper source of information as to a foreign power, its status and sovereignty, is the Sovereign of this country through the Government: *Mighell v. Sultan of Johore*; *Foster v. Globe Venture Syndicate*. In the case of *The Charkieh* Sir Robert Phillimore had recourse to other sources of information in order to determine a question arising in the year 1873 as to the status and sovereignty of the Khedive of Egypt, but in the opinion of Lord Esher, expressed in his judgment in *Mighell v. Sultan of Johore*, this course was wrong. At all events, even if I were entitled to look elsewhere for information I am certainly not bound to do so, and in this case I know of no other sources of information available to which I can safely or properly resort.

I therefore propose to deal with the case upon the information furnished by His Majesty's Secretary of State for Foreign Affairs. The attitude proper

to be adopted by the Courts of this country with regard to foreign governments or powers I understand to be as follows: (1) If a foreign government is recognised by the Government of this country the Courts of this country may and must recognise the sovereignty of that foreign government and the validity of its acts: see *Republic of Peru v. Dreyfus* and the cases there cited. (2) If a foreign government, or its sovereignty, is not recognised by the Government of this country the Courts of this country either cannot, or at least need not, or ought not, to take notice of, or recognise such foreign government or its sovereignty. This negative proposition is, I think, also established and recognised by the judgment of Kay, J. in *Republic of Peru v. Dreyfus*.

Mr. Shearn, in replying to the contention advanced by Mr. Murphy, relied principally on the opinion of Lord Sumner in *The Duff Development Company Limited v. Kelantan Government*⁽²⁾. The following passage appears in that opinion, at pages 823, 824 and 825 :—

The status of foreign communities and the identity of the high personages who are the chiefs of foreign states, are matters of which the Courts of this country take judicial notice. Instead of requiring proof to be furnished on these subjects by the litigants, they act on their own knowledge or, if necessary, obtain the requisite information for themselves. I take it that in so doing the Courts are bound, as they would be on any other issue of fact raised before them, to act on the best evidence and, if the question is whether some new State or some older State, whose sovereignty is not notorious, is a sovereign State or not, the best evidence is a statement, which the Crown condescends to permit the appropriate Secretary of State to give on its behalf. . . . Accordingly where such a statement is forthcoming no other evidence is admissible or needed. . . . There may be occasions when for reasons of State full, unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be temporary if not temporising, or even where some vaguer expression has to be used. In such cases not only has the Court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions 'sovereign' or 'independent' sovereign used in the legal rule mean the same thing. Best, C.J. says in *Yisarri v. Clement* that recognition is conclusive, but, if there is no recognition yet given, the independence becomes a matter of proof. I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the Court might be entitled to accept secondary evidence in default of the best, subject, of course, to the presumption that, in the case of a new organisation, which has de facto broken away from an old State, still existing and still recognised by His Majesty, the dominion of the old State remains unimpaired until His Majesty is pleased to recognise the change.

It should be noted that in that part of his opinion Lord Sumner approved of the judgment of Best C.J. in *Yisarri v. Clement*⁽³⁾. At page 102 Best C.J. said :—

If a foreign state is recognised in this country, it is not necessary to prove that it is an existing state; but if it is not so recognised, such proof becomes necessary.

Mr. Shearn also cited the case of *Statham v. Statham and the Gaekwar of Baroda*⁽⁷⁾ where the Judge did not restrict his inquiries to the certificate from the India Office. Mr. Murphy suggested that case had been over-ruled but could produce no authority for that suggestion.

Reverting to the first case cited by Mr. Murphy — *Mighell v. Sultan of Johore* — there was in that case a conclusive certificate from the Secretary of State for the Colonies that the then Sultan of Johore was an independent sovereign ruler. That case decided that once there is such a conclusive certificate the Court is bound by it, and it is not an authority for the contention put forward by Mr. Murphy.

As regards the case of *The Charkieh*⁽¹³⁾ mentioned in the passage set out above from the judgment in *Mighell v. Sultan of Johore* (*supra*) cited by Mr. Murphy, that case is explained by Lord Sumner in the *Duff Development case* (*supra*) at page 825 as follows:—

In the *Charkieh* the Foreign Office returned a definite and unambiguous answer that the Crown had never recognised the Khedive Ismail or his predecessors as sovereigns, but only as provincial authorities, albeit hereditary ones, who derived their authority and status from the Sultan of Turkey. This was conclusive, and hence it is that Brett, M.R. indicated his opinion, that the further inquiries made by Sir R. Phillimore were unnecessary. In the present case there is a precise and sufficient statement as to the status of the Sultan of Kelantan, as recognised by His Majesty, with nothing ambiguous about it.

Mr. Shearn pointed out, and I agree with him, that the case of *Aksionairnoye Obschestvo A.M. Luther v. Sagor* (*supra*) cited by Mr. Murphy is one of a series of cases which may be termed "revolutionary cases" and deals with conditions in which a new state takes the place of an old state (the old state having been formerly recognised as a sovereign state) and the question of recognition of such new state. On this Roche J. said, in that case, at pages 475 and 476:—

On the general proposition the Courts of the United States appear to take the same view as our Courts. The Supreme Court in *Gelston v. Hoyt* laid down the law as follows: 'No doctrine is better established than that it belongs exclusively to Governments to recognise new States in the revolutions which may occur in the world; and until such recognition, either by our own Government, or the Government to which the new State belonged, Courts of Justice are bound to consider the ancient state of things as remaining unaltered.'

I conclude that none of the cases cited by Mr. Murphy is an authority for the proposition that where the certificate from a Secretary of State is not conclusive the Court is precluded from looking to other evidence. In my view such a proposition is negatived by the opinion of Lord Sumner to which I have already

made reference, and I propose to follow that opinion. Accordingly this contention of Mr. Murphy fails.

Having disposed of those two preliminary points raised by Mr. Murphy, I now come to consider whether the Sultan is or is not an independent sovereign.

At page 115 of *Oppenheim's International Law*, 6th edition, the following statements appear:—

A State in its normal appearance does possess independence all round, and therefore full sovereignty. Yet there are States in existence which do not possess full sovereignty, and are therefore named not-full sovereign States. All States which are under the suzerainty or under the protectorate of another State, or are member-States of a so-called Federal State, belong to this group. That they cannot be full, perfect and normal subjects of International Law there is no doubt. But it is wrong to maintain that they have no international position whatever, and can never be members of the Family of Nations at all.

.... Their monarchs enjoy the privileges which, according to the Law of Nations, the Municipal Laws of the different States must grant to the monarchs of foreign States. No other explanation of these and similar facts can be given except that these not-full sovereign States are in some way or another international Persons and subjects of International Law. Such imperfect International Personality is, of course, an anomaly; but the very existence of States without full sovereignty is an anomaly in itself.

At pages 174 and 175 of the same work the following passage appears:—

Heads of States and Governments of Protectorates enjoy the usual jurisdictional immunities in the Courts of the protecting State and, probably, in those of other States. The protectorate is not considered a mere portion of the protecting State.

In the opinion of Viscount Finlay in the *Duff Development case* (*supra*), the following passage appears at page 814 of the report:—

The question put was as to the status of the ruler of Kelantan. It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another Power; the control, for instance, of foreign affairs may be completely in the hands of a protecting Power, and there may be agreements or treaties which limit the powers of the sovereign even in internal affairs without entailing a loss of the position of a sovereign Power.

Bearing in mind those statements and the opinion of Viscount Finlay, I turn now to a consideration of the letters from the Secretary of State for the Colonies dated the 9th June, 1948, and the 12th November, 1948, the Johore Agreement, 1948, and the Federation of Malaya Agreement, 1948.

The first letter states that His Majesty's Government recognises the Sultan as the Ruler of the State of Johore and that, as such, he exercises attributes of sovereignty. It goes on to refer to *Mighell v. Sultan of Johore* (*supra*) and to state that the independence

of the State of Johore and the sovereignty of its ruler, as recognised in that case, are subject to the Johore Agreement, 1948, the Federation of Malaya Agreement, 1948, and generally upon the position of the State of Johore as a member of the Federation of Malaya.

The second letter of the 12th November, 1948, does not add much to the first letter, but it does state, in paragraph 2 thereof, that before the 20th October, 1945 (which was the date on which the Agreement was entered into between His Majesty's Government and the Sultan of Johore which resulted in the establishment of the Malayan Union under the Malayan Union Order in Council, 1946) His Majesty had no jurisdiction in Johore.

There is no dispute that during the existence of the Malayan Union—i.e. from the 1st April, 1946, to the 1st February, 1948,—the Sultan was not an independent sovereign, but there is no need to consider that further because the Malayan Union is now defunct, having been replaced by the Federation of Malaya.

In my view the starting point for the consideration of the present status of the Sultan is clause 9 of the Johore Agreement, 1948, which reads:—

The prerogative, power and jurisdiction of His Highness within the State of Johore shall be those which His Highness the Sultan of Johore possessed on the 1st day of December, 1941, subject nevertheless to the provisions of the Federation Agreement and this Agreement.

The marginal note to that clause reads:—

"Sovereignty of the ruler".

From that clause it is clear that unless there is anything in the Johore Agreement, 1948, and/or the Federation Agreement, 1948, which destroys the independent sovereignty which His Majesty's Government, by the letter from the Secretary of State for the Colonies dated the 12th November, 1948, admitted was formerly possessed by the Sultan, the Sultan is still an independent sovereign.

That being so I turn now to a consideration of the provisions of those two Agreements.

I deal first with the Johore Agreement, 1948. In the third recital thereto reference is made to the fact that the Sultan has subjects.

In the fourth recital provision is made for the constitutional development of the State of Johore "under the protection of His Majesty". The passages I have already cited from *Oppenheim* make it clear that the fact that the State of Johore is under the protection of His Majesty does not destroy the sovereignty of the Sultan.

Clause 3 gives His Majesty control over defence and foreign affairs. Control of these two matters was provided for in the treaty made between the then Sultan of Johore and Her Majesty the Queen on the 11th December, 1885, to which reference is made in *Mighell v. Sultan of Johore (supra)*, at page 150 of the report, and that did not prevent the then Secretary of State for the Colonies from giving an authoritative certificate that the then Sultan of Johore was an independent sovereign. Further, in the passage cited above from the opinion of Viscount Finlay in the *Duff Development case (supra)*, it is specifically stated that complete control of foreign affairs by the protecting power does not destroy the sovereignty of the protected power.

By clause 9 the Sultan undertakes to govern the State of Johore in accordance with the provisions of a written Constitution which must be in conformity with the Johore Agreement, 1948, and the Federation Agreement, 1948.

That written constitution was promulgated on 1st February, 1948, and published in the Johore Government Gazette of the 5th February, 1948. It was made by the Sultan with the advice of His Council of Ministers and with the advice and consent of his Council of State, the British Adviser, Johore, being a member of such Council.

Article II thereof defines who are subjects of the Sultan; Article III states that the executive authority in the State shall be exercised by the Sultan; Article V provides that the choice of the Mentri Besar (Prime Minister) shall be the absolute right of the Sultan; Article XVIII provides that the Sultan may act in opposition to the State Executive Council; by Article XXXIV no Bill passed by the Council of State can become law until the Sultan has assented to it, and even when the Council of State has passed a Bill the Sultan is empowered to refuse to assent to it. I have no doubt there is nothing in the Johore Agreement, 1948, which negatives the independent sovereignty of the Sultan.

This brings me to the consideration of the Federation of Malaya Agreement, 1948. Clause 155 thereof reads:—

Save as expressed herein, this Agreement shall not affect the sovereignty and jurisdiction of Their Highnesses the Rulers in their several States.

The marginal note to that clause reads:—

"Sovereignty and jurisdiction of Their Highnesses the Rulers".

The immediately preceding clause 154, the marginal note to which is "Power reserved to His Majesty", reads:—

Nothing in this Agreement shall affect the power of His Majesty or the Imperial Parliament to make laws from time to time relating to the defence or external affairs of the Federation, or shall affect His Majesty's sovereignty and jurisdiction in and over the Settlements.

Mr. Murphy drew attention to the difference in wording between the two clauses, pointing out that nothing in the Agreement affects the sovereignty of His Majesty whereas as regards the Sultans the words used are "save as expressed herein". The explanation for the difference in wording is apparent when one bears in mind, that by clause 4 of the Agreement, His Majesty in respect of Johore (and the other Malay States comprising the Federation) has complete control over defence and foreign affairs, which affects but does not destroy the sovereignty of the Sultan. The existence of clause 4 is sufficient to account for the introductory four words of clause 155.

Mr. Murphy in construing the provisions of the Federation of Malaya Agreement relied mainly on the following two points: first, that the Sultans do not have to assent to Bills before they become law; and secondly, that in view of the long list of matters contained in the Second Schedule to the Agreement on which the Federal Legislature is empowered to legislate, and such legislation would have the force of law in Johore, there are few matters on which the Johore Council of State can legislate.

With regard to the first point, Mr. Murphy argued that by clauses 54(2) and 76 it is the Standing Committee of the Conference of Rulers which assents to Bills and that Committee has no power to withhold its assent.

I reject this argument. The Standing Committee is the method by which the assent of the Rulers to any Bill is recorded but first there must be their assent—see clause 54(1), and the opening words of clause 54(1), and the opening words of clause 54(5), which read:—

54 (1) No Bill shall become law until it has received the assent of Their Highnesses the Rulers and either the assent of the High Commissioner in His Majesty's name and on His Majesty's behalf, or the assent of His Majesty given through a Secretary of State.

.....
(5) A law assented to by the High Commissioner and Their Highnesses the Rulers.....

As regards the second point argued by Mr. Murphy it is true that the Federal Legislature has power to legislate on the long list of matters set out in the Second Schedule to the Agreement, and that

by clause 100 the legislative power of the Council of State in each Malay State is restricted to matters of Muslim religion, Custom of the Malays and matters not mentioned in the Second Schedule. Such an argument is really part of another contention put forward by Mr. Murphy that the Sultan of Johore destroyed his sovereignty by agreeing to the State of Johore entering a Federation.

I reject such an argument for two reasons. First, it is negated by the third recital to the Federation of Malaya Agreement, 1948, which reads:—

And whereas His Majesty has accordingly entered into a fresh Agreement with each of Their Highnesses and in the case of Negri Sembilan with His Highness the Yang di-Pertuan Besar and the Ruling Chiefs (which Agreements are hereinafter referred to together as 'the State Agreements') for the purpose of ensuring that power and jurisdiction shall be exercised by Their several Highnesses in their several States and it is in each of such Agreements provided that it shall come into operation on the appointed day:

The words to which I attach particular importance in that recital are "for the purpose of ensuring that power and jurisdiction shall be exercised by Their several Highnesses in their several States".

Secondly, reference to the decision of Their Lordships of the Privy Council in the case of *The Pahang Consolidated Company Limited v. The State of Pahang*⁽¹⁴⁾ shows that when the State of Pahang entered the Federated Malay States in 1895 the Sultan of Pahang remained an absolute ruler. This is so stated by Lord Tomlin, at page 391:—

The constitutional position in Pahang so far as it is material to the matters under consideration in this appeal may be summarised thus:

(1) The Sultan of Pahang is an absolute ruler in whom resides all legislative and executive power, subject only to the limitations which he has from time to time imposed upon himself in the circumstances hereinafter mentioned.

Mr. Murphy endeavoured to get over that part of the opinion of the Privy Council by suggesting that the question of the sovereignty in that case was never really raised and was not an issue in the case. I am unable to agree with that suggestion because an examination of the report of the proceedings in the Court below and in the Court of Appeal, at pages 131 to 228 of (1931-1932) F.M.S.L.R., shows that the constitutional position of the Sultan of Pahang was argued by counsel on both sides and was considered by the various Judges.

The Agreement for the Constitution of a Federal Council, 1909, which can be found at page 71 of *Maxwell and Gibson's Treaties and Engagements, Malay States and Borneo*, provided, by clause 9 thereof, that each State Council of the States of

Perak, Selangor, Pahang and Negri Sembilan could only legislate on questions "connected with Mohammedan Religion, Mosques, Political Pensions, Native Chiefs and Penghulus and any other questions which in the opinion of the High Commissioner affect the rights and prerogatives of any of the above-named Rulers or which for other reasons he considers should properly be dealt with by the State Councils". Thus in the Federated Malay States practically all legislation which had the force of law throughout those States — i.e. in Perak, Selangor, Pahang and Negri Sembilan — was enacted by the Federal Council, and, despite that, Their Lordships of the Privy Council held, as already stated, that the Sultan of Pahang was an absolute ruler.

I have examined the whole of the Federation of Malaya Agreement, 1948, and it is sufficient to say, without making reference to each clause thereof, that I can find nothing therein, construing that Agreement as a whole, which destroys the independent sovereignty of the Sultan.

Accordingly I agree with Gordon Smith J. that the Sultan is an independent sovereign, and was so at the material time, that is when these proceedings came before the Court below for hearing and determination on the 15th to 18th March, 1949.

I now come to the second question (B), which is whether the Sultan waived his privileges as a sovereign ruler.

The following is a summary of the arguments of Mr. Shearn on this aspect of the appeal:—

- (1) the submission by the Sultan to the jurisdiction of the Japanese Court was an act which took place before the High Court of the Colony of Singapore came into existence;
- (2) the Sultan had never submitted to the jurisdiction of the High Court of the Colony;
- (3) that there can be no enquiry into the conduct of the Sultan prior to his objection to the jurisdiction of the High Court of the Colony of Singapore;
- (4) that the proceedings brought by the Trustees under the Japanese Judgments and Civil Proceedings Ordinance, 1946, are separate and distinct from the proceedings brought by the Sultan in the Japanese Court because:—
 - (a) the parties are different;
 - (b) the proceedings by the Trustees are brought by way of an originating summons;
 - (c) the High Court of the Colony of Singapore is a different Court from the Japanese Court;
 - (d) if the proceedings brought by the Trustees are a continuation of the proceedings brought by the Sultan then the address given by the Sultan in those latter proceedings would still have been used, whereas the Trustees did not attempt to use that address for the service of the proceedings brought by them;

- (5) the Trustees have not shown that the Sultan was a sovereign ruler during the Japanese Occupation and therefore it follows that it has not been shown that he had any sovereign rights to waive.

Mr. Murphy, in supporting the judgment of Gordon Smith J. on the question of waiver, relied on the proceedings brought by the Trustees under section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, being a continuation of the same proceedings as those brought by the Sultan himself, and also, independent of that Ordinance, on that part of the judgment of James L.J. in *Strousberg v. Republic of Costa Rica*⁽¹⁵⁾ at page 200, which I have underlined in the following passage from the judgment:—

There is, in my opinion, but one exception, if it can be called an exception, to that rule, namely, that where a foreign sovereign or state comes into the municipal Courts of this country for the purpose of obtaining a remedy; then, by way of defence to that proceeding—by way of counter-claim if necessary to the extent of defeating that claim—the person sued here may file a cross-claim, or take any other proceeding against that sovereign state for the purpose of enabling complete justice to be done between them.

On this question of waiver Mr. Shearn relied mainly on the decision in the *Duff Development Company Limited v. Government of Kelantan*⁽¹²⁾.

The facts in that case are that the Government of Kelantan granted to the Duff Development Company certain mining and other rights by deed, and the deed contained an arbitration clause, which incorporated the Arbitration Act, 1889, so far as applicable. Disputes arose as to the effect of that deed and were referred to an arbitrator, who made an award in favour of the Company. The Government of Kelantan, being dissatisfied with the arbitrator's award, applied to the Chancery Division, under section 11 of the Arbitration Act, to set aside the award, but the application was dismissed. The Government appealed to the Court of Appeal—the appeal was dismissed. A further appeal to the House of Lords by the Government was also dismissed.

Then the Company brought proceedings by Originating Summons in the King's Bench Division under section 12 of the Arbitration Act for leave to enforce the award. The Government applied to set aside those proceedings and to stay all further proceedings on the ground that the Sultan of Kelantan was an independent sovereign ruler and the State of Kelantan was an independent sovereign State. That application succeeded.

It was argued in that case, on behalf of the Company, that if the Sultan of Kelantan was an

independent sovereign ruler he had waived his sovereignty and submitted to the jurisdiction of the Courts in England because :—

- (a) he had agreed to arbitration on the terms of the Arbitration Act 1889, and
- (b) he had applied to the Court to have the arbitration award set aside and pursued that application up to the House of Lords.

It is (b) with which we are concerned in the present appeal, because the Sultan, himself, made the application to the Japanese Court in 1945.

Mr. Shearn's argument on the decision in the *Duff Development* case is that it was there held that the application by the Company to enforce the award was a new proceeding and, that although it was connected with the earlier application by the Kelantan Government to set aside the award, it was distinct from it, and, therefore, on that ground the Sultan of Kelantan could successfully claim his privilege of immunity from the jurisdiction as a sovereign ruler.

Mr. Shearn relied principally on the following passage in the opinion of Viscount Cave (at page 810) :—

There remains the question whether the Sultan by applying under s. 11 of the Act to set aside the award impliedly submitted to an application under s. 12 of the Act to enforce it. In my opinion, he did not. By his application under s. 11 he endeavoured to get rid of the award and left it to the Court to decide his rights in this respect; but the application for leave to enforce the award is a new proceeding, and though connected with the earlier application is distinct from it. In my opinion, therefore, this argument also fails.

From this Mr. Shearn argued that although the Sultan had submitted to the jurisdiction of the Japanese Court and obtained the order which he sought, the application by the Trustees to the High Court of the Colony of Singapore, though connected with the Sultan's application to the Japanese Court, is distinct from it and is a new proceeding

Mr. Shearn conceded that if :—

- (a) the Sultan had brought his application in the High Court of the Straits Settlements prior to the Japanese Occupation, and
- (b) the Trustees had been the defendants to that application, and
- (c) the Sultan had obtained the order he sought,

the Trustees, by the Rules of the Supreme Court, could have applied to the High Court of the Straits Settlements to set aside the order, or they could have appealed against such order, and on such application or appeal the Sultan could not successfully have claimed immunity from the jurisdiction of the Court of Appeal of the Straits Settlements.

Mr. Shearn also conceded that if :—

- (a) the Sultan had brought his application in the High Court of the Straits Settlements prior to the Japanese Occupation, and

- (b) the Trustees had been the defendants to the application, and
- (c) the Sultan had obtained the order he sought, and
- (d) the Japanese Occupation had followed so as to prevent the Trustees from taking the matter to the Court of Appeal of the Straits Settlements,

then, the Trustees, by virtue of section 44 of the Singapore Colony Order in Council, 1946, and by the Rules of the Supreme Court, could have applied to the High Court of the Colony of Singapore to set aside the order, or they could have appealed against such order, and on such application or appeal the Sultan could not successfully have claimed immunity from the jurisdiction of the Court of Appeal of the Colony of Singapore.

This brings me to consideration of the Japanese Judgments and Civil Proceedings Ordinance, 1946. The long title reads :—

"An Ordinance to make provision with regard to judgments, orders and decrees of Japanese Courts and for the carrying on of proceedings instituted in such Courts during the Japanese occupation."

Section 3 is the particular provision under which the Trustees applied to the High Court of the Colony of Singapore. It reads :—

3 (1) Any party to the proceedings in which a Japanese decree was made or given or any person aggrieved by such decree may, within three months from the commencement of this Ordinance, or within such extended time as the appropriate Court may allow, apply in the prescribed manner to the appropriate Court for an order—

- (a) that such decree be set aside either wholly or in part; or
- (b) that the applicant be at liberty to appeal against such decree.

(2) Upon the hearing of an application under the provisions of sub-section (1) of this section the appropriate Court may, subject to the provisions of this section, make such order or orders thereon as, in the circumstances of the case, may seem fit.

(3) No Japanese decree shall be set aside on the ground that the person or persons constituting the Court whose decree is in question was or were not appointed in accordance with the provisions of, or did not possess the qualifications specified in, the existing laws.

(4) Without prejudice to the generality of the provisions of sub-section (2) of this section, a Japanese decree may be set aside on any of the grounds following—

- (a) that it was obtained as a result of such force or threat of force, injury or detriment to any party to the proceedings or other person as in the opinion of the appropriate Court was sufficient to render the action of the party in relation to the proceedings involuntary;
- (b) that any necessary party did not appear personally but was represented by any person appointed by any Japanese authority;
- (c) that it was based on principles unknown to the existing laws, or
- (d) on any other ground which the appropriate Court considers to be sufficient."

The Trustees rely on paragraphs (b) and (c) of sub-section (4) of that section.

Mr. Shearn conceded that the Trustees come within the expression "any person aggrieved by such decree" in sub-section (1) of that section.

That Ordinance nowhere lays down that proceedings in, and decrees of, Japanese Courts are valid or invalid. The whole scheme of the Ordinance is to provide parties to proceedings in, and persons aggrieved by decrees of, Japanese Courts with remedies if they consider that justice has not been done by a Japanese Court. Hence the right to apply to set aside, or to appeal against, a Japanese decree — section 3; the right to carry on in the Colony Courts proceedings instituted in Japanese Courts, which were still pending when the Japanese occupation ceased — section 4; and the right to substitute decrees of the Colony Courts for those of Japanese Courts — section 5; and the comprehensive provisions contained in the Japanese Judgments and Civil Proceedings (Procedure) Rules, 1947, as to what persons are to be served when proceedings are brought under this Ordinance — see G.N. S. 20 in Supplement No. 5 of the Singapore Government Gazette dated the 15th January, 1947.

The Trustees cannot apply under O.38 of the Rules of the Supreme Court to set aside the Japanese decree, nor under O.55 of the same Rules for leave to appeal against such decree, because those Rules do not apply to proceedings in Japanese Courts. Their only remedy is to apply under the Japanese Judgments and Civil Proceedings Ordinance, 1946.

I regard the provisions of that Ordinance, and the Rules made thereunder, generally as analogous to Rules of Court and, in particular, I look upon section 3 of the Ordinance as analogous to Orders 38 and 55 of the Rules of the Supreme Court.

Mr. Shearn contended that the long title to the Ordinance distinguishes between (a) the provisions of the Ordinance relating to judgments, orders and decrees of Japanese Courts, and (b) the provisions relating to the carrying on of proceedings instituted in Japanese Courts.

He stressed the words I have underlined in sections 4(1) and 6, which read:—

"4(1) A party to any proceeding commenced before a Japanese Court which were pending at the cessation of the Japanese occupation, may apply to the appropriate Court, within three months from the commencement of this Ordinance or such extended time as the appropriate Court may allow, for leave to carry on such proceedings as proceedings of the appropriate Court.

6. Where in any proceedings carried on in a corresponding Court under the provisions of section 44 of the Singapore Colony Order in Council, 1946,

any interlocutory order has been made by a Japanese Court such order shall be deemed to have been properly made in those proceedings: Provided that the corresponding Court may, on application made to it in that behalf in the prescribed form and manner, set aside any such order if such Court is of the opinion that it is just and equitable so to do."

Mr. Shearn also stressed that by Rule 3 of the Japanese Judgments and Civil Proceedings (Procedure) Rules, 1947, any application under section 3 of the Ordinance, except in Probate and Divorce matters, must be made by an originating summons. He then referred to the definition of the word "originating" in Rule 3 of the Preliminary Rules of Court, which reads:—

'Originating' as applied to any motion, petition, summons or other proceeding means that such proceeding is taken otherwise than in a pending cause or matter.

All these references, Mr. Shearn submitted, showed that the application by the Trustees under section 3 of the Ordinance is a new proceeding entirely distinct and separate from the proceedings instituted by the Sultan in the Japanese Court.

I am unable to accept that submission. In my opinion it places too narrow a construction on the objects and provisions of the Japanese Judgments and Civil Proceedings Ordinance, 1946.

I do not attach any particular importance to the words relied on by Mr. Shearn in sections 4(1) and 6, because they are the natural words the draftsman of the Ordinance would use for the purpose of continuing proceedings pending in Japanese Courts at the cessation of the Japanese occupation, nor do I attach any particular importance to the use of an originating summons as the method for making an application under section 3 of the Ordinance. If one looks at Rule 7 of the Rules made under the Ordinance one finds that applications in respect of probate and divorce matters made under section 4 of the Ordinance (applications under which Mr. Shearn admitted, would be carrying on proceedings of a Japanese Court) must be made by an originating motion.

What are the Trustees attempting to do under section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946? Their Originating Summons No. 23 of 1947 states, *inter alia*, that they:—

being persons aggrieved by the Japanese decree dated the 18th day of June 2605 (i.e. 1945 A.D.) and made in Originating Summons No. 24 of 2605 (1945) by the Syonan Kotohoin at Syonan-to (being the Japanese Court of the Judge at Singapore) ask

"for an order that such decree be set aside wholly or that the applicants be at liberty to appeal against the whole of such decree on the following grounds".

In other words, they are disputing about the very matter — nothing more and nothing less — about which

the Sultan himself instituted proceedings in the Japanese Court. In my view that is the crux of this case as regards the question of waiver and distinguishes it from the *Duff Development Company Limited v. Government of Kelantan* (*supra*). In that case the Company, when they applied to enforce the arbitrator's award, were not litigating about the very matter concerning which the Government of Kelantan had submitted to the jurisdiction of the Court—namely the application to set aside the award. In the present case the Trustees are litigating about the very matter concerning which the Sultan himself brought proceedings in the Japanese Court—not something “connected with the earlier application”, to use the words of Viscount Cave in that part of his opinion in the *Duff Development case* set out above.

Therefore I hold that the application by the Trustees under section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, is not a new proceeding but is a continuation of the very same proceedings which the Sultan instituted in the Japanese Court.

But Mr. Shearn contended that the High Court of the Colony of Singapore in which the Trustees brought their proceedings is a different Court from the Japanese Court in which the Sultan instituted his proceedings.

As stated earlier in this judgment, I agree with him. My answer is that if the Trustees must bring their proceedings in that Japanese Court, that is demanding of them an impossibility. No Japanese Court functioned after the Japanese occupation ceased. The only Courts functioning after the occupation are the Courts established by the legitimate power. The legitimate power altered the Constitution and, *inter alia*, established the Supreme Court (of which the High Court is a part) of the Colony of Singapore. The Trustees have brought their proceedings in the only Court open to them.

Since, as conceded by Mr. Shearn, section 44 of the Singapore Colony Order in Council, 1946, would prevent the Sultan from successfully claiming immunity in the High Court of the Colony of Singapore if he had brought proceedings in the High Court of the former Straits Settlements—they are two different Courts—I fail to see why a similar state of affairs should not result from the existence of the Japanese Judgments and Civil Proceedings Ordinance, 1946. It is true, as Mr. Shearn pointed out, that the bridge between proceedings in the High Courts of the former Straits Settlements and those in the High Court of

the Colony of Singapore is contained in an Order in Council, but I cannot see why the bridge between proceedings in Japanese Courts and those in the Courts of the Colony of Singapore created by the Japanese Judgments and Civil Proceedings Ordinance, 1946, should not perform the same function. One would not expect the Order in Council to contain the special provisions of that Ordinance.

I can find nothing in the *Duff Development case* to support Mr. Shearn's contention that the Court must be the same. The emphasis, as I read the report of that case, is that the proceedings must be the same.

With regard to the parties to the proceedings in the High Court of the Colony of Singapore not being the same as they were to the proceedings in the Japanese Court, Mr. Shearn referred to the following passage in the judgment of the Japanese appointed Judge who adjudicated upon the proceedings instituted by the Sultan:—

His Excellency the Mayor of Syonan was represented by the Deputy Custodian of Enemy Property and the attitude which he takes is this: in his view, this is *prima facie* enemy property and as such the Custodian can dispose of it in any manner he thinks fit and proper.

Mr. Shearn also referred to the following passage in the Originating Summons filed by the Trustees:—

That the following necessary parties did not appear personally in the proceedings leading up to such decree, namely, the Applicants and H.H. Ungku Fatimah of Johore but that if any of them were represented at all (which is denied) they were represented by a person appointed by some Japanese Authority and such person so appointed did not appear on the hearing when the said Decree was made.

From these two references Mr. Shearn argued that the Japanese Custodian of Enemy Property did not represent the Trustees and that this is admitted by the Trustees in this Originating Summons.

All I need say on this is that the Sultan in instituting proceedings in the Japanese Court cited the Japanese Custodian of Enemy Property as the defendant to those proceedings, and this could only have been done because he considered that the Custodian represented the Trustees—it could not have been done for any other purpose.

Japan, as a signatory assenting to the International Convention concerning the Laws and Customs of War on Land, 1907, and the Regulations thereunder, except Regulation 44 thereof from which she dissented, bound herself to respect private property, and her Custodian in Singapore should have acted in accordance with that Convention. Therefore he either represented the Trustees in the proceedings in the Japanese Court,

or should have done so. Whether he did effectually represent them or not, does not matter—he was cited as defendant and, to my mind that is sufficient evidence that he was, or should have been, standing in the shoes of the Trustees who were absent from Malaya during the Japanese occupation. Therefore I am unable to agree with the contention of Mr. Shearn that the parties in the present proceedings are different parties.

I do not attach any importance to the submission by Mr. Shearn that the Sultan was served at a different address for service in these proceedings than the address he gave for service in the proceedings he instituted in the Japanese Court. The address given in the Sultan's Originating Summons is—Messrs. Eric Choa and Company, 20 Malacca Street, Singapore. Questioned by me, Mr. Shearn stated that that firm did not continue after the cessation of the Japanese occupation but that Mr. Choa became a member of a different firm at the same address. In my view this is sufficient to dispose of that argument.

One further argument put forward by Mr. Shearn was that the Trustees had not shown that the Sultan possessed any sovereign rights during the Japanese occupation and therefore it had not been shown he had any rights to waive.

As I have already stated earlier in this judgment, the Sultan was an independent sovereign prior to the Japanese occupation, and the following passages from two leading text-books on International Law dispose of Mr. Shearn's argument.

First, *Oppenheim's International Law*, Vol. II, 6th edition, page 338 :—

What concerns us here is the sum of the rights and duties of the occupying belligerent in relation to his political administration of the territory, and to his political authority over its inhabitants. The principle underlying these modern rules is that, although the occupant in no wise acquires sovereignty over such territory through the mere fact of having occupied it, he actually exercises for the time being a military authority over it.

Secondly, *Hall's International Law*, 6th edition, pages 463 and 464 :—

Recent writers adopt the view that the acts which are permitted to a belligerent in occupied territory are merely incidents of hostilities, and that the authority which he exercises is a form of the stress which he puts upon his enemy, that the rights of the sovereign remain intact, and that the legal relations of the population towards the invader are unchanged.

Looking at the history of opinion with reference to the legal character of the occupation, at the fact that the fundamental principle of the continuing national character of an occupied territory and its population is fully established, at the amount of support which is already given to the doctrines which are necessary to complete its application in detail,

and to the uselessness of the illogical and oppressive fiction of substituted sovereignty, the older theories may be unhesitatingly ranked as effete, and the rights of occupation may be placed upon the broad foundation of simple military necessity.

Accordingly I hold that the Sultan by instituting proceedings in the Japanese Court submitted to the jurisdiction of that Court; that by virtue of the Japanese Judgments and Civil Proceedings Ordinance, 1946, the proceedings brought by the Trustees in the High Court of the Colony of Singapore are a continuation of the proceedings instituted by the Sultan in the Japanese Court, and therefore the claim by the Sultan of immunity from the jurisdiction of the High Court of the Colony of Singapore fails.

Having so decided on my view of the Japanese Judgments and Civil Proceedings Ordinance, 1946, I turn to Mr. Murphy's argument, that irrespective of the provisions of that Ordinance the Sultan cannot claim immunity from the proceedings brought by the Trustees.

As I have already stated, Mr. Murphy relied on the passage from the judgment of James L.J. in *Strousberg v. Republic of Costa Rica*⁽¹⁵⁾ which is set out earlier in this judgment. That passage is cited with approval in *Westlake's Private International Law*, 7th edition, page 272, and by Lawrence J. in *Mighell v. Sultan of Johore* (*supra*). The principle is that if a sovereign ruler or state submits to the jurisdiction of the Courts by instituting proceedings himself, the person sued may "take any other proceeding against that sovereign or state for the purpose of enabling complete justice to be done between them".

Much as I would like to agree with Mr. Murphy on this argument I regret, for the following reasons, I am unable to do so.

In the *Duff Development case*, Lord Carson, in his dissenting opinion, made reference to *Strousberg v. Republic of Costa Rica* (*supra*) and the passage in *Westlake*. From the principle enunciated in that case Lord Carson, at pages 834 and 835 of the report of the *Duff Development case*, said :—

My Lords, under such circumstances as these, how can it be said that, when the act of the sovereign power has invoked the benefits of the procedure devised by the laws of this country for enforcing its claims or settling its disputes, 'international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State' requires that our Courts should lend themselves to such palpable injustice as to refuse a mutual relief to both parties concerned? or how can it be suggested that under such circumstances we would be acting upon the principles laid down in the cases I have already quoted of doing complete justice between the parties if we refused the application of the appellants?

None of the other members of the House of Lords in that case referred to *Strousberg v. Republic of Costa Rica*, and therefore I must conclude that the argument of the Duff Development Company, which was that in bringing proceedings in Court to enforce the award after the Kelantan Government had brought earlier proceedings in Court to set aside the award, they did so with the object of enabling complete justice to be done between them and the Kelantan Government, failed.

I cannot see that the claim of doing complete justice between the parties applies with any greater force in the present case than it did in the *Duff Development case*, and therefore, much as I should have liked to have done so, I am unable to accept Mr. Murphy's argument.

Mr. Murphy also submitted that the Sultan cannot claim immunity because the proceedings are in respect of real property within the jurisdiction of the Court. He was unable to cite any English authority for this proposition and relied on foot-note 4 on page 239 of vol. I of the 6th edition of *Oppenheim's International Law*. The first few lines of that foot-note read :—

But there is probably no immunity when the State is sued as owner of real property — for a survey of cases see Fairman in A.J., 22 (1928) pp. 567, 568.....

("A.J." means the American Journal of International Law which is not available here).

If this had been accepted in England as an exception to the Rule with respect to actions against foreign sovereigns, I would have expected it to have been so stated by Lawrence J. in his judgment in *Mighell v. Sultan of Johore (supra)* and also by Lord Carson in his opinion in the *Duff Development case (supra)*, because the exceptions are mentioned in both that judgment and opinion.

Accordingly, in the absence of any English authority, I am unable to accept the proposition put forward by Mr. Murphy. He stated that he put this proposition forward for the purpose of having a note of it on the record in the event of this case going further.

Accordingly I would uphold the decision of Gordon Smith J. in the Court below, and dismiss this appeal with costs to the respondents.

Evans, J. : — This is an appeal from a judgment on an application by the appellants to have proceedings brought by the respondents under the Japanese Judgments and Civil Proceedings Ordinance 1946 set aside and all further proceedings stayed on the ground that

the appellant is a Sovereign Ruler and not subject to the jurisdiction of this court. The learned Judge who tried the case found that the appellant was so immune from being sued, but that by bringing those proceedings in the Syonan Kotohoin, which these proceedings were brought to set aside, he waived his immunity and submitted to this jurisdiction.

He has appealed primarily on this question of waiver. Before however there can be any waiver, there must be an immunity to be waived. The respondents entered a cross appeal against the finding on sovereignty, though they were in any case at liberty to attack that finding on the appeal itself. The appellant's counsel produced and read to the Court a further letter from the Secretary of State to the appellant referring to the judgment appealed against and to these proceedings, and implying a far less limited recognition by His Majesty of the appellant, than is to be found in the certificate therein referred to and read in the court below.

The parties disputed the intention of this letter and at their request a further letter was addressed to the Secretary of State by the Chief Justice of Singapore on 29th July 1949, which, after reference to the two letters addressed to Brown J., which Gordon Smith J. held, do "not answer the question asked by the court", referred to and attached the letters produced at the first hearing of this appeal. The first of those letters from the Sultan to the Secretary of State dated 28th June 1949 reads as follows :—

"28th June, 1949.

The Rt. Hon. The Secretary of State for the Colonies,
Church House,
Great Smith Street, S.W.1.

Dear Mr. Creech Jones,

On the 9th June, 1948, you wrote to the Hon. Mr. Justice T. A. Brown of Singapore, with regard to my status as an Independent Sovereign Ruler, in connection with certain proceedings taken in my country. That letter was, unfortunately, couched in very vague terms, and merely stated facts known to everybody, but without expressing any opinion as to their effect upon my position.

It is extremely important that I should now have a letter, or certificate, from you stating in unequivocal terms that, under the existing Agreements with His Majesty, I am an independent Ruler, and recognized as such by His Majesty. There can, I take it, be no question about this, and I shall be grateful if you can let me have such a letter as I require, at your earliest convenience.

An appeal from the Proceedings in Johore is due to come on for hearing about the 18th July next, and it is vital that my legal advisers should have the letter in their hands before that date.

Sincerely yours,
(Sgd.) IBRAHIM."

To this the substance of the Secretary of State's reply of 11th July marked "Y" is:—

Your Highness will know that on the certificate which I gave to the Court Mr. Justice Gordon-Smith found that you enjoy your former status of a sovereign Ruler. This seems clearly to mean that you are an independent sovereign (subject to the limitations mentioned by the Judge) and His Majesty's Government, of course, accept the ruling. I trust that Your Highness will now regard the matter as satisfactorily settled.

The Chief Justice continued:—

Counsel for His Highness the Sultan submitted that the contents of letter Y mean that his Majesty's Government recognizes His Highness as an independent sovereign.

Counsel for the Respondents disputed this and suggested that in order to clarify the position the President of the Court of Appeal should address a further letter to you.

Accordingly, as President of the Court of Appeal, I have the honour to invite an answer to the following question:

Does your letter Y of the 11th July, 1949, mean that His Majesty's Government recognizes His Highness the Sultan of Johore as an Independent sovereign?

The Secretary of State replied on 20th August 1949 and the whole substance of that reply seems to be in the last sentence:—

It was not intended to convey more than that His Majesty's Government accepted the decision of the Court, which I believed was not being further contested, and the letter was not intended to affect the decision of any higher court before whom the question might come on appeal.

This letter enclosed further correspondence in the matter. The first letter in that correspondence dated 13th July 1949 is written on behalf of the Secretary of State to the Sultan and is to the same effect as the letter of 11th July. The second is of the same date from Messrs. E. F. Turner & Sons the Sultan's solicitors to the Secretary of State and after setting out the state of the proceedings and the law proceeds:—

In view of the fact that an Appeal in the Proceedings in which His Highness is interested is expected to be heard on the 18th instant, may we beg that a further letter may be supplied, stating His Majesty's Government's own view with regard to His Highness's status, so that we may cable a copy out to Malaya, in the hope that it may be accepted by the Judiciary there.

The fourth as they stand is from the same firm dated 18th July and embodying a cable from the Sultan's Malayan advisers reiterating the request and concluding:—

In the interests of justice therefore, may we beg for an immediate reply to our letter of the 13th instant, in the form of an unequivocal certificate as to His Majesty's Government's view of our Client's Sovereignty.

The other two letters are replies on behalf of the Secretary of State. The earlier of 18th July states:—

It is agreed that in cases such as the present, the practice is for the Court to ask the Secretary

of State for a statement regarding the Ruler's status, but not for such a statement to be requested by, or supplied to, the Ruler himself. You will also appreciate that a Secretary of State is not obliged to return an answer of the kind you seek and indeed that, if he thought fit, he would be entitled to decline to answer the question put by the court.

Otherwise these letters expressly add nothing of substance, but they clearly amount to a refusal to accede to the Sultan's reiterated petition.

The respondents contend that the court in considering an application of the kind before it must look at any communication received from a Secretary of State and purporting to convey an intimation of His Majesty's opinion on this matter, and cannot look outside it. The appellant does not seriously seek to put any definite meaning on these letters from the Secretary of State. He draws attention to the fact that the Secretary of State never said His Majesty did not recognise the Sultan as sovereign and to the statement in the letter of 12th November 1948 to Mr. Justice Brown that "before the 20th October 1945 His Majesty had no jurisdiction in Johore", but apart from this his contentions are that the court is not restricted to the Secretary of State's letters, but that if these be not clear it can enquire elsewhere and that the Secretary of State has invited its attention to the Johore and Federation of Malaya agreements of 1948. In support of his contention he relies principally on certain *dicta* of Lord Sumner in the *Kelantan case*⁽²⁾ at pages 824 *et seq.*

Whether a defendant is an independent Sovereign ruler is a matter of which the courts will take judicial notice. The question may be raised in many connections, and, like any other, may be admitted. Where it is disputed, and where the court cannot decide the matter of its own knowledge, the practice has grown up, and is now well established, of inquiring through a Secretary of State what His Majesty's view of this fact may be, or, where more than one body exists claiming to be sovereign, which His Majesty is pleased to recognise as such. The appellant relies strongly on extracts from the work of *Mr. Oppenheim* on International Law. While such a work may be considered with the utmost respect, it is not binding on this court, nor is the law it professes to expound that which this court sits to enforce except in so far as he may base his opinions on English precedents. This court is not in the least concerned with the status of the Sultan of Johore in the eyes of an international lawyer. In the procedure adopted and in its actual practice there can be and has been no chance of conflict of opinion between the courts and the executive.

The first case on which the appellant relies is *Yrisarri v. Clement*⁽⁵⁾. In that case the only question in any way bearing on sovereignty, that of the existence of a state, was in the end held to be admitted by the defendant in his pleadings. There is some talk of recognised and unrecognised states without reference to by whom, or how, such recognition is to be ascertained, and some of how any presumption of continuance of a state is rebuttable. The appellant stated that this case is before the adoption of the procedure referred to. In my opinion it has no bearing on the case before us.

In *The Parlement Belge*⁽¹⁶⁾ upon which the later cases largely depend, the question was not of the fact of sovereignty but the extent of the immunity conferred. The fact of sovereignty was not questioned for the protest to the jurisdiction was entered by the Attorney General himself. In *Mighell v. Sultan of Johore*⁽¹¹⁾ the Court was asked to say that the certificate of the Secretary of State was not conclusive, but inconsistent with the treaty attached thereto. Wills J. in the Divisional Court seems to have accepted the certificate as conclusive and makes but a passing reference to the treaty and no finding on the point. In the Court of Appeal Lord Esher, M.R. said at page 158 :—

The first point taken was that it was not sufficiently shewn that the defendant was an independent sovereign power. There was a letter written on behalf of the Secretary of State for the Colonies, on paper bearing the stamp of the Colonial Office, and which clearly came from the Secretary of State for the Colonies in his official character. He is in colonial matters the adviser of the Queen, and I think the letter has the same effect for the present purpose as a communication from the Queen. It was argued that the judge ought not to have been satisfied with that letter, but to have informed himself from historical and other sources as to the status of the Sultan of Johore. It was said that Sir Robert Phillimore did so in the case of *The Charkieh*⁽¹³⁾. I know he did but I am of opinion that he ought not to have done so; that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign. For this purpose all sovereigns are equal. The independent sovereign of the smallest state stands on the same footing as the monarch of the greatest.

As the logical consequence of so finding, he does not discuss the attached treaty at all. Lopes L.J. does not consider the method by which the court is to inform itself on this matter. Kay L.J. referring to the Secretary of State's letter said :—

I confess I cannot conceive a more satisfactory mode of obtaining information on the subject than such a letter. Proceeding as it does from the office of one of the principal secretaries of state, and purporting to be written by his direction, I think it must

be treated as equivalent to a statement by Her Majesty herself, and, if Her Majesty condescends to state to one of her Courts of Justice, that an individual cited before it is an independent sovereign, I think that statement must be taken as conclusive.

Thereafter, however, his Lordship appears to have looked at the treaty, though he certainly does not discuss it in detail, and to hold that it is not inconsistent with the letter. There being no conflict between these he did not have to consider how far his action was itself logical. His clear words above seem to leave no doubt as to his opinion of the relative importance of the documents.

Statham v. Statham and His Highness the Gaekwar of Baroda⁽⁷⁾ was decided in December 1911. It was a divorce petition and the court did not follow the usual procedure of obtaining a certificate from the India Office. The appellant relied heavily on this case, and the respondent seemed to think it against him. I could not see, and still cannot, that it is a strong support for the appellant's case. The decision is one of a Judge in first instance and the husband in the upshot being given leave to proceed without naming a co-respondent, may not have been seriously prejudiced. Bargrave Deane J. did not follow the usual procedure in the other Divisions and does not seem to have been asked to do so. He made some researches, and these revealed a certificate from the India Office in a case decided the same autumn. It may well have been the existence of a recent certificate on the very point which led the judge to refrain in such circumstances from addressing a further letter to the Secretary of State for India. In his judgment he sets out this certificate in full and then goes on to consider the meaning of a word used therein and in the Statute to which it also refers. This consideration is extensive, but is as to the construction of the certificate and not as criticism of it. He concludes :—

In my opinion this aptly states the true status of the present Gaekwar of Baroda and is consistent with the status of that sovereign prince as defined by the certificate from the India Office, and it follows that his Highness by international law is not capable of being made a co-respondent in a suit for dissolution of marriage in the High Court in England, and his name must be struck out as a co-respondent. I, however, give leave to the petitioner to proceed without making any co-respondent as to those paragraphs of the petition in which his Highness's name appears.

A case in which the usual and well approved procedure is not followed is of little weight in deciding a case in which that procedure has been adopted, and where there are certificates peculiar to that case. Moreover, as I understand Bargrave Deane J., he did in fact attach primary importance to the certificate. If he regarded himself as following Lord Phillimore in

contradistinction to Lord Esher's opinion above I should not be prepared to follow him.

The case which comes nearest to this in many circumstances is that of *Luther v. Sagor*⁽⁹⁾. That case first came before Roche J. in November and December 1920. The judge followed the usual procedure despite the fact that there were already before him three letters from the Foreign Office one addressed to the solicitors of the defendants' vendor, and one each to the solicitors of defendant and plaintiff. The Court's enquiry elicited no further information. The learned Judge, on a review of the cases dealing with recognition rather than sovereignty, said :—

I therefore propose to deal with the case upon the information furnished by His Majesty's Secretary of State for Foreign Affairs. The attitude proper to be adopted by a Court of this country with regard to foreign governments or powers I understand to be as follows: (1) If a foreign government is recognized by the Government of this country the Courts of this country may and must recognize the sovereignty of that foreign government and the validity of its acts: see *Republic of Peru v. Dreyfus*⁽¹⁷⁾, and the cases there cited. If a foreign government, or its sovereignty, is not recognized by the Government of this country the Courts of this country either cannot, or at least need not, or ought not, to take notice of, or recognize such foreign government or its sovereignty. This negative proposition is, I think, also established and recognized by the judgment of Kay, J. in *Republic of Peru v. Dreyfus*.

He then sets out the letters from the Foreign Office and goes on :—

It was said on behalf of the defendants that these communications were vague and ambiguous. I should rather say that they were guarded, but as clear as the indeterminate position of affairs in connection with the subject-matter of the communications enabled them to be; but lest it should be deemed that ampler or further information might now be available, I caused communication to be made by a Master of the Crown Office to His Majesty's Secretary of State for Foreign Affairs, asking whether there was in addition to the letters to the parties or their solicitors further matter or information which should be placed before me. The reply of the Secretary of State was that he had no further information which he desired to place before me. On these materials I am not satisfied that His Majesty's Government has recognized the Soviet Government as the Government of a Russian Federative Republic or of any sovereign state or power. I therefore am unable to recognize it, or to hold it has sovereignty, or is able by degree to deprive the plaintiff company of its property. Accordingly I decide this point against the defendants.

The penultimate sentence of this passage seems to show that the negative proposition is most properly read as "cannot recognise". At least in that form is it the *ratio decidendi* of this point of the case.

This decision was appealed against and came before the Court of Appeal in April and May 1921. On 16th March 1921 a Trade Agreement was signed with Russia, and in answer to appellant's requests two

further letters were obtained from the Foreign Office on April 20th and 22nd. The former stated :—

(2) I am to inform you that His Majesty's Government recognize the Soviet Government as the *de facto* government of Russia.

"Under these circumstances" said Bankes L.J. 'the whole aspect of the case is changed'. The Court of Appeal however went out of its way to affirm the judgment of Roche J., both Bankes and Warrington L.J. specifically stating that on the materials before him they entirely agreed with his view, and Scrutton L.J. saying that his judgment was set aside "on the new materials available".

The appellant relied on *Pahang Consolidated v. Sultan of Pahang*⁽¹⁴⁾ but in my opinion that case has no bearing at all on this point, nor on this case, being concerned with the Sultan's position in the State of Pahang.

The only substantial support for the appellant's argument is to be found in the speech of Lord Sumner in *Duff Development Co. v. Kelantan Government*⁽²⁾. In that case a letter was received from Colonial Office stating that Kelantan was an "independent state" and the Sultan the "sovereign ruler". The letter set out some facts as to His Majesty's relation with that state, and enclosed a treaty and agreement. All the Law Lords found in this letter a clear and unambiguous assertion of the Sultan's sovereignty. Their references to the enclosures varied. Lord Cave refers to them shortly but makes no sort of analysis. Lord Finlay said :— "There are very good reasons for this practice. The department might lay itself open to serious misunderstanding if it took any other course. It might be said that there was a want of candour in merely stating the conclusion that the Power is a sovereign Power without disclosing any such limitations on the sovereignty as exist here. The contention that by appending these documents the Colonial Office remits the question to the Court to form its own opinion upon it is based on a misconception". Lord Dunedin made a short speech; he did not refer to the treaty but he seems to have been of opinion that "the home sovereign has in him the only power and right of recognition". Lord Carson's speech is the most significant in this regard, he alone of their Lordships thought that the letter was not consistent with the enclosures. He regarded himself as bound by the letter. Lord Sumner's speech is great authority and the greater by reason of the fact that the commencement of the speech seems to show that his Lordship intended to deal fully with the subject. As to the case before the House his opinion is clear enough. "It is the prerogative of the Crown

to recognize or to withhold recognition from States or chiefs of States, and to determine from time to time the status with which foreign powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown recognises as a sovereign, is such a sovereign for the purposes of an English Court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed. I think that this is the real judicial explanation why it was held that the Sultan of Johore was a foreign sovereign. In considering the answer given by the Secretary of State, it was not the business of the Court to inquire whether the Colonial Office rightly concluded that the Sultan was entitled to be recognized as a sovereign by international law. All it had to do was to examine the communication in order to see if the meaning of it really was that the Sultan had been and was recognized as a sovereign".

Although this begins by speaking of "to recognize or to withhold recognition" certain of the later sentences might be read as applying only to cases in which a positive certificate was forthcoming. I do not think this is intended. When his Lordship goes on to consider hypothetical cases not before him, the opinion is not, to me, so lucid, but it is on these *dicta* the appellant must rely. They follow immediately on the above passage. His Lordship refers to cases where the "answer to the question put has to be temporary if not temporising, or even where some vaguer expression has to be used". He passes however at once to two cases in the first of which "there is no recognition yet given" and in the second "the Crown had never recognized" the defendant. Any implication of knowledge of later events in these expressions must, of course, be ignored, and they are in fact cases of negative certificates.

In considering the first of these Lord Sumner speaks of the Crown declining to answer the enquiry, and says that then the Court "might be entitled to accept secondary evidence in default of the best, subject, of course, to the presumption that, in the case of a new organization, which has *de facto* broken away from an old state, still existing and still recognised by His Majesty, the dominion of the old state remains unimpaired until His Majesty is pleased to recognise the change". This then is a fourth case in all, and the third in this paragraph: the case of no answer, the others being an affirmative, a negative or an inconclusive reply.

His Lordship goes on tentatively to consider questions as to the boundaries of foreign states, though declaring they stand on a different footing, and refers to the cases of *Foster v. Globe Venture Syndicate*⁽⁶⁾ and *Luther v. Sagor*⁽⁹⁾. This question might appear disparate from that of sovereignty. Sovereignty I understand to be at International Law a mixed question of fact and law, and at English law a pure question of fact i.e. His Majesty's opinion. The former would seem to be, like other questions of boundaries, primarily a matter of fact of which better evidence might be obtained, even in the remote cases referred to, from the history of the tribes and their grazing customs and from geographical and topographical features, albeit in fact the tribes may graze where they can and find what political support they may. Judicial decisions involving such considerations could not however generally be executed or otherwise given effect to without the assistance of the home or foreign governments. The necessity for agreement between the decisions of the King's Courts and His Majesty's views on these matters at once becomes apparent. This is the *nexus* between such cases and that under consideration and this is the ground of Farwell J's decision in *Foster v. Globe Venture Syndicate* where he said "Sound policy seems to me to require that I should act in unison with the government on such a point as that".

The connection of this case with *Luther v. Sagor* is not to me clear. The latter seems to me a case of a vague certificate, the word "guarded", applied to it by Lord Roche, might be applied to the letters here. There is however no hint or suggestion by Lord Sumner that Roche J., as he then was, was wrong or that he should have sought extraneous evidence. I see no reason why all certificates affirmative negative or indefinite should not come within the passage of Lord Sumner's speech set out above. Whichever it may be, it is yet His Majesty's opinion, or the best evidence thereof.

Where a certificate is refused Lord Sumner thinks secondary evidence might be sought. The immediate question is: Secondary evidence of what? The answer is of His Majesty's recognition of the claimant's status. It is difficult to see what that secondary evidence could be. The refusal itself seems to be strong evidence of non-recognition. Evidence at large could not be given of His Majesty's acts or those of his servants, since to draw deductions from these would be to define or interpret His Majesty's policy. I conceive that it could only be found in some Act of State such as a Proclamation, or as in *Statham v. Statham*⁽⁷⁾ a certificate in another case. Such earlier de-

finite opinion, can, however, avail little, a later refusal or guarded certificate may or would indicate a change of opinion and the effect of such change is demonstrated in *Luther v. Sagor*⁽⁹⁾.

In this case appellant's own counsel relies little on the letters. As to them he says only that they do not say the Sultan is not a sovereign, and that that of 12th November 1948 states "Before 20th October 1945 His Majesty had no jurisdiction in Johore". The fact that there is no denial of sovereignty is immaterial. Though this be a matter on which the court will, if necessary, inform itself, nevertheless evidence can be tendered, (Lord Sumner 1924 A.C. at page 827). In either event the court must be satisfied that the defendant is duly recognised otherwise his plea fails.

Jurisdiction is certainly not determinative of sovereignty. The Crown exercised jurisdiction in Turkey and China as to whose sovereignty there was never any doubt. Jurisdiction similar to that exercised by the British Crown under the Foreign Jurisdiction Act 1890 was acquired in the former country at a time when it was one of the greatest military powers and arose from the impossibility of dealing with Christians under Islam where law and religion are one. So too the Slave Trade was suppressed by grants of jurisdiction to British courts or to mixed courts by states whose sovereignty was never questioned. The apparent assumption therefore that the statement in the letter of 12th November 1948 amounts to an assertion that the Sultan was Sovereign prior to 20th October 1945 is without foundation.

There is however an earlier recognition of the sovereignty of the state of Johore in the case of *Mighell v. Sultan of Johore*⁽¹¹⁾. This is expressly referred to in the last paragraph of the letter of 9th June 1948 with a warning that the position has now materially altered. In that case the Secretary of State's letter stated "Johore is an independent state and territory in the Malay Peninsula and that His Highness Abu Bakar is the present sovereign ruler thereof, that the relations between himself and His Majesty the Queen which are relations of alliance and not suzerainty, are now regulated by treaty, wherein he is called the Maharajah of Johore; that the Sultan has raised and maintains armed forces by sea and land, has organised a postal system, dispenses justice through regularly constituted Courts of Justice, and generally speaking exercises, without question, the usual attributes of a Sovereign ruler". Paragraph 2 of the letter of 9th June is an emasculated redraft of this. The state is no longer described as "independent" nor

the ruler as "sovereign", and he is now only said to exercise "attributes of sovereignty". — The later paragraphs may be added as an explanation of the varied opinion.

The fourth of those paragraphs might suggest to a Moslem prince a wide exception, and to imply, for the reason above referred, no sort of interference between Moslem and Moslem, or Moslem and Ruler. This is however a common provision in Protectorate Treaties and has been given a narrower interpretation than elsewhere.

There is a presumption of continuance but it can have only occasional application in these cases. There is no statement of loss of recognition and as the matter stood in July, this argument seemed strong. The subsequent letters and the refusals to the Sultan render it no longer tenable. It is suggested the Secretary of State may have been misled by Brown J's letter to which the Secretary of State's letter of 12th November 1948 is a reply. I do not think so. The Secretary of State is well advised as to what is required. The letter of 9th June 1948 deals with the present position, which, I think, alone matters. The Sultan's letter set out above is perfectly clear and the Chief Justice's letter of 29th July only repeats the Sultan's question.

It is suggested that the matter is left by the Secretary of State to the Court. The question of fact was always with the court; the Secretary of State cannot by letter or otherwise vary what "for the purposes of an English court of law", the court must seek: The Court applies for information and not for an issue of fact or law. Parties may ask for a decision on facts stated or agreed, but the Secretary of State is not a party, and the Respondent has not agreed. It may be His Majesty would be prepared to submit any question between himself and the Sultan to the decision of a British Court. The Sultan's opinions on this matter are abundantly clear from his letters, but a matter far more dim is what His Majesty thinks of the Sultan's status and any assumption of contention would imply non-recognition by His Majesty which in itself is sufficient for the purpose of this court in this case.

The documents attached are agreements. In their nature they would hardly seem to be the place to find the opinion of one of the parties of the other. Had I to analyse these documents I should be inclined to attach more importance to the recitals, as statements of fact than to the expressions of common intention, and there seems a great difference between that of the Treaty of 1885 :—

AGREEMENT on certain points touching the relations of Her Majesty's Government of the Straits Settlements with the Government of the Independent State of Johore, made between the Right Honourable Frederick Arthur Stanley, Her Majesty's Secretary of State for the Colonies, on behalf of the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, and His Highness the Maharajah of Johore.

and recitals 2 and 3 of the Johore Agreement 1948:—

AND WHEREAS it has been represented to His Majesty that fresh arrangements should be made for the peace, order and good government of the State of Johore:

AND WHEREAS His Majesty in token of the friendship which he bears towards His Highness, the subjects of His Highness, and the inhabitants of the State of Johore is pleased to make fresh arrangements to take effect on such day as His Majesty may by Order in Council appoint (hereinafter called "the appointed day"):

Had the court to construe these documents they could only do so by reading them as treaties at International Law which could not produce the answer required, or as contracts when it would seek the common intention the law would ascribe to the parties, not the opinion of one. In them is no clear statement of recognition by the Crown which could be read as amplifying the certificates, nor could such statement be of more recent date.

The appellant's own contentions were largely an answer to his preliminary point. When speaking of the Sultan's assent to Bills under Article 54, and his obligations under Article 8 of the Federation Agreement and a suggestion that steps might be taken to dispense with assent, he described this as circular reasoning based on an assumption of non-sovereignty, and quoted Kay L.J. in *Mighell v. Sultan of Johore*⁽¹⁾ where he suggests that "If the Sultan disregards it (the obligation to accept advice) the consequences may be the loss of that protection, or possibly other difficulties with this country". That clearly is begging the question with an assumption of sovereignty. There is however, a great difference between a treaty from which a party may resile at will and agreements such as these attached by the Secretary of State. In fact the only answer is in the policy of His Majesty and the means of enforcing it. These are not matters for the court, and were such matters to be discussed we might expect to be addressed at length in the language with which Mr. Shearn concluded his reply.

Again he tells the Court it must decide if Sovereignty is in the Sultan, the Federation or His Majesty. The authorities seem to show clearly the court should do nothing of the kind while a British court may for the benefit of a British subject have to define the limits of the prerogative. I cannot believe that one who is not a British subject can require it to

trace the limits of His Majesty's Sovereignty. Vaughan Williams L.J. in rejecting Mr. Hall's thesis on the Foreign Jurisdiction of the British Crown in *Sekgome's case*⁽¹⁸⁾ refused to regard the external exercise of His Majesty's Royal Power in relation to such persons as dependent on statute, or in effect to treat it as other than a matter of fact. There is no other answer to Mr. Hall's argument. For acts outside the realm against such person might be raised the plea of Act of State on which the ratification, which gives to the act its character, may similarly be proved by letter of the Secretary of State that seems to conclude inquiry, *Buron v. Deman*⁽¹⁹⁾. The appellant's arguments would seem to ignore the function of a municipal court. We are mercifully spared seeking the absolute truth but that on facts between parties. There is no reason to suppose that the respondents here know, or are in a position to prove, all the facts and considerations on which His Majesty's opinion would be based, and still less the appellant, the object of the opinion. The court can neither put itself in His Majesty's place to form an opinion, nor substitute its own based may be on International Law. As Lord Sumner says: "for the purposes of an English Court of Law", a municipal court can only look for His Majesty's recognition and the same limitation seems implied locally in the terms of Section 57(1) (viii) of the Evidence Ordinance. While His Majesty may not, except by constitutional convention, be restricted as to the form of the expression of his opinion yet the forms of evidence and scope for interpretation seem alike very limited.

I am not satisfied that the Sultan of Johore is recognised by His Majesty as an independent Sovereign, but on the view I take on other matters it is not necessary to decide the case on this point, as it can better be decided on a point of substantial justice than on one of mere political theory.

The main point in the appeal itself was that the learned Judge was wrong in holding that the proceedings brought in the Syonan Kotohoin were a submission to the jurisdiction of this court. This Court, it was argued, is the Supreme Court of the Colony of Singapore and came into existence on 1st April 1946 only. It is not the same court as that of the Straits Settlements, though a submission thereto might have constituted a submission to this court, and it most certainly is not the same court as the Syonan Kotohoin in which on 3rd May 1945 proceedings were instituted by the appellant. Moreover the parties to that suit and in these proceedings were not the same.

The respondents argued that they came into this court under the terms of the Japanese Judgments and Civil Proceedings Ordinance 1946 and that Ordinance equates these proceedings to those, and puts themselves on the same footing as a party thereto. This court is the successor, and in effect the same court as the Kotohoin which was properly conducted, administered English law and lawfully stood in the place of the former Straits Settlements Court. They also relied on a dictum of James, L.J. in the case of *Strousberg v. Republic of Costa Rica*⁽¹⁵⁾ where he says that a defendant sued by a foreign sovereign may counterclaim "or take any other proceeding against that sovereign state for the purpose of enabling complete justice to be done between them". Those proceedings having regard to the very special circumstances are proceedings which would come within that dictum.

The respondents relied on an affidavit of Mr. Ess in which it is stated that :—

The old staff of the former Supreme Court of the Straits Settlements except the Europeans who had escaped from Singapore or had been interned by the Japanese, were re-appointed to the position which they had previously held.

The practice and procedure of the said Syonan Kotohoin was identical with the practice and procedure of the former Supreme Court of the Straits Settlements both in civil and criminal matters, except (i) that as regards criminal matters the procedure was slightly altered by a ruling to the effect that before an accused or an appellant could be acquitted the Japanese criminal judge had to be consulted. A few amendments were made to the criminal law under which some new offences were created and some punishments for old offences were varied, (ii) that the former heading of all proceedings in the Courts was changed from "In the Supreme Court of the Straits Settlements, Settlement of Singapore" to "In the Syonan Kotohoin, Syonan."

Apart from those slight amendments the criminal law was unaltered. Civil law and civil procedure was left completely unaltered in so far as it affected British subjects except for the formal heading of the proceedings mentioned in the last paragraph hereof. However, in a case in which one or both of the parties were Japanese, the Japanese Judge was the only judge who had jurisdiction to try the case. In such a case the Japanese would adopt as far as I am aware the Japanese procedure and the Japanese civil law.

The learned judge who decided the case seems to have relied heavily on the fact that orders in both proceedings were signed by the same Assistant Registrar. Were it not for this I should have thought the proposition beyond question that a Court consists of Judges, and at least as regards this court, or the Straits Settlements Court, that proposition is clear for the words of Section 3, Courts Ordinance are quite definite. The facts of the Japanese occupation are common knowledge and records of the Kotohoin are among the records of this Court.

Singapore was surrendered on 15th February 1942 and the Japanese entered into military occupation on the morning of 16th February 1942. The sessions of the Supreme Court were then continuing and sittings had been held up to that time. None of the Judges of this Court had left the country and sufficient judges were resident in this building to constitute a full court. They were that day removed at the point of the rifle, and later interned.

As a power in military occupation of territory it was at international law the duty of the Japanese to give the inhabitants access to the courts they were accustomed to. The law administered and the procedure should continue without alteration. The cases of the courts of Alsace in 1870 and of the Belgian courts in 1914/18 illustrate the nature of these obligations. The Articles of war are to the same effect. It is said the occupying power was entitled to intern judges and others, and that "all legitimate steps he takes in the exercise of this right must be recognised by the legitimate government after the occupation has ceased". *Oppenheim International Law* Vol. II S. 169 (6th Ed.).

It may be that the occupying power has such rights and that its legitimate acts must be recognised. There is here, however, no evidence at all that the Japanese occupation was conducted in accordance with the conditions prescribed, and none of the necessity to remove judges. Moreover, even supposing these facts could be proved, such courts established by necessity are not the courts of the occupied country but those of the occupying power. In fact a proclamation of annexation was issued and the name of the court was changed indicating a changed court. In the Writs issued His Majesty's name was struck out, and "Dai Nippon Teikoku" substituted, and they were witnessed, not by the Chief Justice of Singapore, but by a Judge of the Syonan Kotohoin.

It was suggested at the conclusion of the argument that the courts of the British Military Administration continued cases from the Kotohoin. Those courts were given very wide powers, and what may have been done from necessity or by consent, or without objection of parties seems to me of small moment. The Kotohoin were never recognised as the legal continuing courts of the country. By the Proclamation made and published in Kandy but to take effect here by Lord Mountbatten on 15th August 1945 section 6 provided :—

All courts and tribunals, other than military courts established under my authority are hereby suspended and deprived of all authority and jurisdiction until authorised by me to reopen.

Orders made by Japanese courts after that date have been treated as void. Those courts were treated as enemy courts. The Ordinance, under which respondents are proceeding, refers throughout to Japanese Courts and Japanese judgments.

The fact that the same Assistant Registrar signed in each case may reflect on the nature of his acts but cannot affect the character of the courts.

I am therefore unable to agree with the learned trial Judge that this court is the same as the Syonan Kotohoin. I feel no doubt that it is not.

This fact in itself appears to me sufficient to dispose of any question of waiver. The jurisdictional immunity of the appellant depends not on his position at international law, nor what his standing might be before some court at the Hague, nor yet on his position relative to the Mikado; but on what he is recognised as being by His Majesty the King. His actions therefore in a Japanese court albeit in military occupied territory, cannot in my opinion affect his position in this court.

It is suggested that the Japanese proceedings may have been in some way collusive. There is no evidence of this, beyond the absence of defence, nor do we know the Sultan's foresight in April 1945. We do know that this family property of which he was the original grantor, was then sequestered, and of no benefit to any member of the family, and would so continue for an unknown period. It is I think a matter of general and common knowledge of the history of the country, that the Sultan's own country was itself under military occupation, that meetings of the Sultans and the Japanese were held, but there is no evidence whatever in detail of the relations of the Sultan as a sovereign, or as a litigant with the Japanese.

Nevertheless it is said these are the same proceedings. In order to effect a waiver I think it must be shewn that the submission is to the same jurisdiction, and in the same proceedings and, as the respondents cannot shew the first the second appears immaterial. In most cases the same proceedings must be in the same jurisdiction, but in the special circumstances here, it is said, they need not be so. The point being specifically taken must be considered. The proceedings are undoubtedly closely connected. The matter can now only be brought into this court by virtue of the provisions of the Japanese Judgments and Civil Proceedings Ordinance 1946. I agree that the fact that the respondents were not parties to the original proceedings is immaterial, for the legislator must be

understood to have used the words "any person aggrieved" rather than "party" to include such persons as the respondents who are absentees with an undoubted interest in the subject matter. This court is however bound by the decision in *Duff Development Co. v. Kelantan Government*⁽²⁾ and that case seems closely analogous to this in that regard. There three of the law Lords clearly held that an application under Section 11 of the Arbitration Act 1889 to set aside the award was not such a submission to the court's jurisdiction as would extend to a subsequent application by the other side under Section 12 of the same Act to enforce the award, but that the latter was a "new proceeding and though connected with the earlier application is distinct from it". Proceedings could hardly be more closely connected, the subject matter of both was the same award.

The proceedings in this court are connected with and arise out of those in the other, the Japanese, Court. They are brought under Section 3(1) of the Japanese Judgments and Civil Proceedings Ordinance 1946 which provides:—

3.—(1) Any party to the proceedings in which a Japanese decree was made or given or any person aggrieved by such decree may, within three months from the commencement of this Ordinance, or within such extended time as the appropriate Court may allow, apply in the prescribed manner to the appropriate Court for an order—

- (a) that such decree be set aside either wholly or in part; or
- (b) that the applicant be at liberty to appeal against such decree.

This section confers on the persons for whose benefit it is made, a new right to attack and possibly to defeat what certainly were in the times of the Japanese Military Occupation vested rights, and which now are rights defeasible, and by inference defeasible only, in the manner prescribed. Such proceedings are in exercise of a totally new right which applies to all judgments of the courts prescribed regardless of date. The rights obtained by Japanese Judgments stand until set aside; they are not nullified by the liberation nor by the respondents' challenge, so that the appellant must prove his case over again.

Rules made under the Ordinance prescribe proceedings by Originating Summons, and in this case there was great difficulty in effecting the fresh service required. These facts are emphasised by appellant, they are appropriate to new proceedings but whether these proceedings are the same or fresh, is to be decided rather by their nature than by their incidents.

Proceedings under the Ordinance of 1946 cannot be equated to proceedings under Order 27 rule 15 or Order 39 of the Rules of the Supreme Court which

are limited to default judgments and in time, and which, had the courts and proceedings been in fact the same, would themselves have been available in their limited scope. The legislator clearly thought they did not apply or were insufficient, and he provided a new right. Proceedings based on fraud and available at any time to reverse a judgment — are by a fresh action *eo nomine*. In such case the claim is based on fraud and only when that is established do the earlier proceedings come in question. It is clearly a new proceeding and whether the courts would in such case take a wider view or might make an exception need not concern us as fraud is not here pleaded. In my opinion these cannot be regarded as the "same proceedings".

The three questions of whether the jurisdiction, the proceedings and the parties are the same here as in the Kotohoin were argued as if they were distinct. They are in fact interdependent, and the first is by far the most important. The parties are parties to the proceedings and apart from the proceedings have no existence as parties. If this point is to be considered they are apart from the proceedings different persons, and the Japanese Custodian was acting at that time adversely to the present respondents. If the proceedings are the same the parties for that purpose also are, the Ordinance of 1946 putting them on the same footing. On the other hand if, as I think, jurisdiction and proceedings are different so are the parties.

Respondent also relied on the above *dictum* of James, L.J. It is pure *obiter*. The court in *Strousberg's case* did not act on it but upheld the immunity of the Costa Rican Republic. It must be read in the light of the decision and so read can only apply to "any other proceeding" in the same cause or matter. It was said in argument that in *Strousberg's case* the counterclaim greatly exceeded the claim and arose out of other dealings, but the first of these facts is quite irrelevant and the second might well be. The plaintiff's application for substituted service was there rejected because his claim was not in form a counterclaim, but a new action on a new writ. Jessel M.R. said "It is a simple independent action and the only object of it is to get judgment for the sum of money alleged to be due for the purpose of setting that judgment off against the former judgment", and James L.J. himself went on "Pollock, B. was induced to take the view that this was really and in substance a case of defence to the original suit. But then the original suit was brought to such a point that this could by no possibility be used as a defence in that suit, and the position merely resolved itself

into this, that, because the Republic of Costa Rica had once brought an action in this country, and had obtained a judgment against the defendant in that action, that at any time afterwards, because there had been that suit at one time pending between them, that same defendant may come to this country and say: "I submitted to the jurisdiction in your claim, and I now say that you must submit yourselves to the jurisdiction in my claim". This seems to me apposite to proceedings under this Section 3, and more particularly to those under paragraph (a). If proceedings be taken under (b) they are in the nature of an application for leave to appeal and then in the words of Lord Finlay in the *Duff Development Co. v. Kelantan Government* at page 819⁽²⁾ "The leave of the Court being necessary before the award can be enforced as if it were a judgment, if a sovereign State claimed its immunity this would be a good reason for refusing the leave". The Sultan asked for construction of a deed, obtained it, and on it has entered on the land. I am at a loss to see how his position can differ, and for him be worse, by reason of the fact that he went by way of the Japanese Court and not by a simple unlawful entry.

This brings me to the last point taken by respondents and taken but briefly; that the sovereign's immunity does not extend to claims in respect of land or property within the jurisdiction. Their Counsel referred to *Oppenheim's International Law* Volume I, page 239 n. 4 and to *Burns v. Siemens Brothers*⁽²⁰⁾ where, he contended, the court accepted an argument that in addition to jurisdiction specifically conferred by Statute, it had an inherent jurisdiction to enforce legal rights of property.

Wheaton expresses an opinion more definitely in his favour holding that "The tendency of international law is to protect such property in all cases where any dealings with it would impair the dignity of the foreign sovereign, and to substitute negotiations between governments for proceedings in the local Courts in such cases. But where the suit can be carried on without affecting his dignity, there seems no objection to the local Court deciding the case in the ordinary way. He will also probably be amenable to the local Courts in respect of actions arising out of such immovable property as he possesses within the territory".

The second exception referred to in *Strousberg v. Republic of Costa Rica*⁽¹⁵⁾ is actually more to the point; that is the case of trust property within the jurisdiction in which a foreign sovereign may have an interest, an exception to the general rule which was

acted on in *Gladstone v. Musurus Bey*⁽²¹⁾. Here the property was subject to a trust but is now apparently held freed from the trust. *The Parlement Belge*⁽¹⁶⁾ and *Jupiter*⁽²²⁾ show that the case cannot be put as high as the respondents would. Those proceedings were against the property itself temporarily within the jurisdiction, but the property was of a very movable nature, for which reason, and on the facts of the former case, it could not be suggested that coming within the jurisdiction implied any submission to it.

Prior to 1870 an alien could not hold land in England and it is therefore perhaps not surprising to find no English case concerning land, nor are European sovereigns often resident outside their own country. English tenure is feudal in origin and all land was held mediately or immediately of the King. It would seem difficult in such circumstances to deny his jurisdiction or expect it to be withheld. Moreover the consequence of attempted tenure by an alien was forfeiture to the Crown.

In India such cases might be expected and in fact have not been infrequent. So much so that legislative provision has been made recognising the principle contended for. It is to be found in Section 86 Civil Procedure Code subsections (1), (2) and (5) of which read:—

- 86.(1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.
- (2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy —
 - (a) has instituted a suit in the Court against the person desiring to sue him, or
 - (b) by himself or another trades within the local limits of the jurisdiction of the Court, or
 - (c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.
- (5) A person may, as a tenant of immovable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

It will be seen that no difference is made between princes and the representatives of foreign sovereigns, and that the cases in which the Government may assert jurisdiction include those which are the exceptions to a sovereign's immunity in works on International

Law and in the cases cited in this court. A distinction is drawn between cases in which the princes' title to land could and those in which it could not be called in question. This is not without significance for the descent of the land may follow that of the sovereignty, and a claim to land might be, and in fact has been, used to test the claim to the principality, *Neelkish Deb Burmono v. Beerchunder Thakoor*⁽¹¹⁾. Where it can not be called in question (subsection 5) the prince may be sued as of right, which goes to shew the immunity is not personal, but depends on the nature of the claim.

Singapore was a part of the Indian Empire till 1866, and here too the difficulties arising from the presence of sovereigns who might not be wholly foreign was felt as is shewn in the cases of (1861) *Nairne v. Rajah of Quedah*⁽²⁴⁾ and (1843) *Abdul Wahab v. Sultan of Johore*⁽²⁵⁾. The latter case in which the Sultan of Johore was held not to be entitled to immunity in these courts, was not cited and probably could not now be relied upon, but the decision rested at least in part on the nature of the claim in the action and not on the person of the defendant. Neither of these cases refers to land.

It has always been held that by the Treaty of Cession and the first Charter of Justice English law was imported into this colony. The cession of 1824 is one of Sovereignty and property to the East India Company. There appears to be no express provision as to the tenure of land either in the later Singapore charter of 27th November 1826 or in 6 Geo. IV c. 85 (s.19-21). In the absence thereof reference may be made to Sir Roland Braddell who, in his book *Law of the Straits Settlements Vol. I* page 43, sets out the tenures actually created. It will be seen that all are leases except the last which arises from long possession and which can hardly be regarded as granted. In such case the courts might presume, as was the case in the Settlement of Malacca in the absence of supposed Dutch grants, the grant of a title in fee simple, *Moraiss & Ors. v. De Souza*⁽²⁶⁾, unlikely as this would seem, or they might more logically presume a lost grant of the kind usually made. The present form of Crown grant is old. It does not specify the tenure. The tenants in fee simple would presumably be tenants in chief, and the grantees by lease clearly could not question their lessors' title. In the original settlement before the court that of 1st December 1903 the Sultan claims to have been seised in fee simple of land forming part of Government Grant No. 91 of 14th September 1869.

The Sultan of Johore is an alien and can only hold land under the Statutory provisions enabling

such persons to hold. Lord Brougham's argument in *Mayor of Lyons v. East India Company*⁽²⁷⁾ does not apply here. Section 2 Naturalisation Act 1870 provides :—

2. Real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject: Provided, —

- (1) That this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise:
- (2) That this section shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him:
- (3) That this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this Act, or in pursuance of any devolution by law on the death of any person dying before the passing of this Act.

The local ordinance suggests that here, as in other Colonies, the rule may not have been strictly enforced for it provided in 1875 :—

2. Any alien may by grant, conveyance, lease, assignment, succession, inheritance, bequest, or otherwise, take, acquire, hold and possess any lands or other immovable property situated in this Colony, and the said lands or other property as aforesaid may sell, transfer, assign, bequeath or transmit to any other person as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions and privileges as if he were a natural born subject of His Majesty residing in this Colony.

3. Every such grant, conveyance, lease, assignment or bequest, sale, transfer or other act prior to the twenty-fourth day of December, 1875, made or done by or with any such alien, and the right to all property derived by or through any alien prior to the said date by succession, inheritance, transmission or otherwise, shall be deemed as valid and effectual to all intents and purposes as if it had been made, done or derived by, with or through any natural born British subject.

Section 3 appears to validate such former holding for the purpose of title only. Although the rights and privileges of the alien are said here to be as full and effectual as those of a natural born subject, whereas in England the alien was not entitled to any of the privileges of a British subject except privileges of property, the effect is I think the same and they hold subject to the same privileges. More recent grants are made subject to the terms of the Crown Lands Ordinance (Cap. 113), yet, it is said, these terms would be virtually unenforceable against a foreign sovereign who holds land. This I cannot believe to be the law.

In *The Parlement Belge*⁽¹⁶⁾ Brett L.J. (as he then was) gave a long and carefully prepared judgment for the full court. He speaks of the immunity of the person of any foreign Sovereign or ambassador, of the ambassador's property and of the public property of any state. This is none of these. It is said to be derogatory to the foreign sovereign's independence or dignity to summons him as if he were subject to or expected to submit to a jurisdiction foreign to his state. There are not the same difficulties as to service in an action for recovery of land. In the case of many personal actions, the English courts in effect say: Sue the sovereign in his own courts by such process as he there permits. It is however unlikely that his courts would try a case concerning land here and outside his jurisdiction, and it is even more unlikely that these courts or this government would recognise their judgments in such cases. It therefore appears to me that this contention of the respondents is founded on sound legal principles. To allow such a claim in respect of land held privately under a Crown grant would be tantamount to converting this claim of personal immunity to one differing little from territorial sovereignty of the land no matter how unlawfully the occupation of such land may have been obtained.

This point was not argued at length nor did the appellant effectively reply to it. The paucity of authority does not excuse this court from coming to some decision on the matter. It can, I think, be decided on principle. The immunity now claimed is both outside that previously recognised, and unnecessary for the purposes for which that immunity is said to exist. On the other hand it might deprive a complainant of all remedy in any place and is inconsistent with the English theories of land tenure. It was not shewn that this is such an action concerning land. On the face of it, it is a proceeding to set aside a declaratory judgment. The declaratory judgment was one on the construction of instruments creating interests in land. Should the respondents proceed by action to recover possession of the land, of which under the instruments they had the beneficial interest they would be met with this judgment. This proceeding appears to me therefore to be one concerning land, which is undoubtedly within this jurisdiction and, which is the subject of a private and personal claim of the Sultan, and not a claim of public property of the State. In such case it seems to me the Sultan is subject to the jurisdiction of this court.

Appeal dismissed.